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Analysis

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The Curtailment of Criminal Appeals to London

On the 24th September 2010, the Office of the Solicitor to the Advocate General announced the commencement of “an informal consultation concerning the way in which acts of the Lord Advocate in her capacity as head of the system of prosecutions might give rise to devolution issues under the Scotland Act”.¹

The Advocate General’s announcement referred to the fact that a collective submission had been authored in the name of the judiciary of the Court of Session on this matter, and was submitted by the judges to the Calman Commission. The Calman Commission considered, however, that the matters raised in the Court of Session judiciary’s submission to it went beyond its remit, and did not respond to them. Instead, the Advocate General has set up a new “expert group” (two of whose members were on the Calman Commission) “to consider this issue afresh”.² This group has been asked to:³

... assess the extent to which it [the Lord Advocate being subject to the devolution issues regime] causes problems in practice for the courts and the operation of the criminal justice system and to make recommendations in relation to any reform which the group considers appropriate.

Now all this may sound like a matter of legal *arcana* – and, indeed, is largely presented as such in the terms of the Advocate General’s consultation paper. But what is in fact being discussed in this consultation is a proposal, in effect, to free Scottish criminal prosecutions from the Convention rights scrutiny of the Scotland Act, leaving the prosecution authorities in Scotland bound only as public authorities by their duties under the Human Rights Act 1998. And the significance of such a change, if brought into effect, would be the ending of the jurisdiction of the UK Supreme Court to hear criminal appeals from Scotland.

1 Office of the Advocate General for Scotland, “Devolution Issues and Acts of the Lord Advocate – An Informal Consultation”, 24 Sep 2010, at www.oag.gov.uk/oag/102.62.html. A short (identically titled) consultation paper was published on the same date at the same address.

2 Ibid.

3 Ibid.

At heart what seems to be at issue is a question of judicial primacy. What this consultation procedure raises is a question about which should be the top court in Scottish criminal matters: the High Court of Justiciary acting as a criminal appeal court, or the UK Supreme Court? But given that that is the real issue, it is of some concern that the consultation process fails to set this out clearly and unequivocally. Instead it presents its intervention in this area of central constitutional importance and impact as if it were one of not more than minor technical adjusting or fine-tuning of existing Scottish criminal procedure. No doubt, individuals and organizations will have differing views as to whether any such proposed change in the criminal jurisdiction in Scotland is a good or a bad thing, but one thing is clear: it is, from a constitutional perspective, a significant and potentially momentous change.

A. THE DEVOLUTION JURISDICTION OF THE UK SUPREME COURT IN SCOTTISH CRIME

Certainly one of the wholly foreseen, foreseeable and intended results of the devolutionary settlement was the ending of the complete isolation of the Scottish criminal legal system within the Union. The Scotland Act 1998 from the outset envisaged and made express provision in Schedule 6 for the possibility of appeals from Edinburgh to London in criminal cases. The subsequent steps in the evolution of the devolution jurisdiction of the Privy Council (and now of the UK Supreme Court) mean that there are now few, if any, criminal cases in Scotland in respect of which the London based court may claim jurisdiction and pronounce a remedy: whether affirming, modifying or overturning the decision of the Scottish criminal appeal court; and whether on an accused's appeal or that of the Crown.

The central issue which this consultation's reference to the "technicalities of devolution issue procedure" masks is a profound and a simple one, which requires no great specialist knowledge or understanding of the *arcana* of Scottish criminal procedure. The issue is this: should parties (both the prosecution and the defence) in criminal proceedings in Scotland continue to have the possibility of taking an appeal to the UK Supreme Court from decisions of the Scottish criminal appeal court? Once that is recognized as the real issue, then much of the technical undergrowth can be swept away and the plain question posed: why should an existing tier of criminal appeal in Scotland be removed? Are there overwhelming public interest considerations for such a major constitutional alteration of the original Scotland Act schema? If so, what are they? If not, on what basis can any change be justified? But such questions are not raised in either the Court of Session judges' Calman submissions or in the Advocate-General's consultation.

And it seems to be only the Court of Session judges in Scotland who, thus far, have expressed any public opposition to the development of the devolution jurisdiction of the UK Supreme Court such as to give it extensive appellate jurisdiction over Scottish criminal cases. It is highly doubtful whether criminal defenders resent or object to the current constitutional framework which allows for the possibility of an appeal to

London and, indeed, the Crown *qua* prosecutor in Scotland has not been slow to exercise its rights to appeal or reference to London where it disagrees with a decision of the courts in Scotland.

An undertone of apparent resentment to the very idea that the decisions of the criminal appeal court might be subject to appeal to and scrutiny by the UK Supreme Court seemed at times to characterize the tenor of some of the Court of Session judges' Calman submissions. Certainly the fact that the Scottish Government and/or the prosecution authorities in Scotland may find the consequence of certain of the judgments of the UK Supreme Court in criminal matters unwelcome does not support the assertion made that there have been "considerable difficulties for parties and the courts". Which parties, one may ask? And which courts? And, in any event, in what sense might "difficulties for courts" be a relevant consideration in considering the proper extent of the procedural protections to be afforded the individual's fundamental rights from State power?

Such procedural difficulties as the Court of Session judges speak of are found in the intimation requirements for devolution issue. But these, surely, can be resolved by the judges themselves amending the relevant Act of Adjournment to bring its provisions more into line, if so advised, with such procedure as already exists for the intimation of Convention rights issues raised in civil cases? And all this can be done without the need for any amendment to the Scotland Act itself such as is being considered by the Advocate-General's expert group.

B. OPTIONS FOR CONSTITUTIONAL REFORM

At paragraph 15 of the consultation document it is noted that, in their submissions to the Calman Commission,⁴ there were three possible solutions put forward by the judges of the Court of Session to the "problems" which they thought that they had identified (albeit that, in the absence of any general agreement among them, the judges failed collectively to endorse any one of them and there was no public breaking of the ranks to identify which judges favoured which solution, and why). Their three possible "solutions" were:⁵

- (i) to have the UK Parliament amend section 57(2) of the Scotland Act 1998 so as to exclude the Lord Advocate's acts in her capacity as head of the system of criminal prosecution in Scotland from the operation of the *vires* / competency controls of the 1998 Act (and implicitly removing such issues from the devolution jurisdiction of the UK Supreme Court);
- (ii) to leave the Lord Advocate with her function as general legal adviser to and member of the Scottish Executive, but hive off her prosecution functions to a new post of "Director of Public Prosecutions in Scotland" who would be

⁴ The Commission on Scottish Devolution. The Commission's final report, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, was published on 15 June 2009 and is available at www.commissiononscottishdevolution.org.uk/papers.php.

⁵ See "Submission by the Judiciary in the Court of Session", 10 Oct 2008, available at www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf

responsible for the prosecution system, but who would not be a member of the Scottish Executive (and whose acts or omissions would again be thereby removed from the devolution jurisdiction of the UK Supreme Court);

- (iii) to introduce a general right of appeal with leave in criminal matters from the criminal appeal court in Scotland to the UK Supreme Court. The Court of Session judges appear to shy at this possible solution, stating:⁶

... a change of such a radical nature would be likely to generate considerable controversy. However, it would put the criminal appeal court in Scotland on the same footing as the court of appeal in England and Wales in relation to criminal matters.

The first two proposed solutions would, it is said, bring the system for the prosecution of offences into line with the systems in England and Wales and Northern Ireland by having a Director of Public Prosecutions in each jurisdiction, who would be subject only to the “lawfulness” controls of the Human Rights Act. But then in Scottish criminal law and procedure—as distinct from crime elsewhere in the UK—the UK Supreme Court would no longer have any jurisdiction to ensure uniformity in approach across the United Kingdom in relation to the proper interpretation of Convention rights. The third proposed solution would, for the first time since the 1707 union, explicitly place the whole of Scottish criminal law and procedure under the supervisory jurisdiction of the UK court.

At paragraph 16 of the consultation document it is said that the Expert Group is considered competent only to consider the first of the proposed solutions put forward by the Court of Session judges. But why this should be is not explained, given that that first solution involves just as much significant institutional or constitutional change—in removing an existing tier of appeal to the UK Supreme Court—as do the other two. And it is quite wrong and wholly misleading for the abolition of the possibility of an appeal in criminal matters to the UK Supreme Court to be described, as it is in paragraph 16, as a “technical change ... to the scope or operation of devolution issue procedure”.

In any event, “solutions” are only required if one accepts the premise that the present system is indeed problematic, and that is not self-evident. The abolition of the possibility of any Scottish criminal appeals to London would certainly be the result of the “option” set out in the consultation document’s proposal that “acts of the Lord Advocate ... no longer be considered to give rise to devolution issues in procedural terms”.⁷ But it is submitted that, on close examination, nothing said by the Court of Session judges points to the existence of problems such as would necessitate substantive amendment in the current provisions of the Scotland Act. Such problems as these judges have in fact identified seem only to relate to procedural issues which are within their power to remedy without need for any amendment to the Scotland Act.

⁶ Para 15.

⁷ Para 17 of the consultation document.

C. CONCLUSION

The question arises as to what precise constitutional role did the Court of Session judges consider themselves to be playing in making collective submissions to the Calman Commission? It could hardly be the interests of the prosecution (for they would be served by submissions from the Lord Advocate or Crown Office) nor indeed the interests of the accused or their legal representatives. And the general interest in the smooth administration of justice would seem properly to be within the constitutional remit of the Minister for Justice, not of the judge – whether individually or collectively – whose proper constitutional role, surely, is to apply the law and constitution as he or she finds it, rather than to engage in political campaigns to change it?

It may perhaps be said, in response, that in publicly participating in the Calman Commission's process the Court of Session judges were, at least, being open in their political involvement in pressing for constitutional change. But such judicial participation nonetheless marks a remarkable constitutional development in and of itself.

Aidan O'Neill

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The Upper Tribunal in the Higher Courts

A. TWO CASES

There is something dysfunctional at the top of the UK legal systems. In the Tribunals, Courts and Enforcement Act 2007 the UK Parliament created an elaborate new system of tribunals which included, at its peak, an entity known as the Upper Tribunal. The Act defined the composition of the Upper Tribunal. It defined the jurisdiction of the Upper Tribunal – in the main, to hear and determine appeals from first-tier tribunals in the new system, but also a novel “judicial review” jurisdiction. The Act also defined the circumstances under which decisions of the Upper Tribunal might be taken on appeal to the ordinary courts. Because the 2007 Act deals with a tribunal some of whose subject-matter (including, for example, social security and immigration) is “reserved” under the Scotland Act 1998 it extends to Scotland and, therefore, determines relationships between the Upper Tribunal and the Court of Session (as to those issues of appeals and judicial review) as much as it does between the Upper Tribunal and the courts of England and Wales.

The point of the 2007 Act was, in broad terms, to implement the recommendations of the Leggatt Review¹ by bringing a better-defined structure, coherence and integrity to the previous, rather chaotic, pattern of tribunals – benefits (if their

¹ *Tribunals for Users: One System, One Service* (2001). See www.tribunals-review.org.uk/

promise is fulfilled in practice) which are, so far, largely denied to Scotland because of the exclusion from the reform, within this jurisdiction, of all the “devolved” tribunals.² Despite this asymmetric impact of the Act, its general effects in relation to the Upper Tribunal are the same in all the UK jurisdictions. In some respects, the Upper Tribunal represents a reformed continuity of provision from what went before in the shape of the previous appellate tribunals. In some other respects, however, it was clearly intended, and not only in the ways in which it united the jurisdictions of those tribunals, to have a higher status.

So far, so good. A new tribunal, with newly-defined powers and newly-defined relationships to the higher courts. But a problem has arisen which has now to be resolved by those courts and ultimately, it is assumed, by the UK Supreme Court. Lurking unresolved within all the finely-honed rules relating to the Upper Tribunal is the question of what should happen if a person is aggrieved by a decision of the Tribunal outwith those categories of decision which may be taken on appeal to the Court of Session or to the English Court of Appeal. This is the question which has arisen in *Eba v Advocate General for Scotland*³ in relation to a refusal by the Upper Tribunal of permission to Ms Eba to appeal against a decision denying a claim to a disability living allowance by the first-tier tribunal. In parallel proceedings in England, *R (on the application of Cart) v Upper Tribunal*⁴ the same question has arisen in relation to the Upper Tribunal’s refusal to grant permission to hear an appeal against a decision of the first-tier tribunal in respect of a child support payment. Inevitably, these issues arise as questions of whether the Court of Session and the English High Court have the authority to judicially review those decisions of the Upper Tribunal which are not subject to a statutory appeal and, if so, whether or not on the same terms as the review of “ordinary” tribunals. Should the Upper Tribunal, because of the terms and conditions of its creation, be treated as a special case and protected, to some degree, from judicial scrutiny?

At first instance, the courts in both jurisdictions followed rather similar lines of argument – by the time *Eba* was decided, Lord Glennie had the opinion of Laws LJ⁵ in *Cart* available to him – and broadly placed the Upper Tribunal in a middle category. It was not to be regarded as unreviewable but it should be reviewed only in exceptional circumstances.

On appeal, however, the two jurisdictions have gone down different tracks. At this stage, the timing of the two hearings was such that neither court was able to take account of the decision of the other.⁶ In *Eba*, the First Division added a coda to its

2 There are, however, proposals for reform in Scotland. The Scottish Government has been consulting on the (Philip) Report on *Options for the Administration and Supervision of Tribunals in Scotland* (2008), available at www.ajtc.gov.uk/docs/Tribunals_in_Scotland.pdf.

3 [2010] CSIH 78. For the Outer House decision, see *Eba*, *Petitioner* 2010 SLT 547.

4 [2010] EWCA Civ 859. For the Divisional Court decision, see [2010] 1 All ER 908.

5 With which Owen J agreed.

6 See *Cart* at para 7 where the Court of Appeal said: “It may well be that the two cases will meet in another place, but for the present they are running on parallel but separate rails.”

opinion,⁷ noting that the Court of Appeal's judgment in *Cart* had appeared whilst their own opinion was in draft.

(1) *Cart*

The Court of Appeal's decision in *Cart* was in two stages. As to the status of the Upper Tribunal the Court denied that the 2007 Act's description of its having "the same powers, rights, privileges and authority as the High Court" (section 25(1)(a))⁸ and as a "superior court of record" (section 3(5)) gave it any immunity from judicial review.⁹ It was not, *pace* Laws LJ, an alter ego of the High Court.¹⁰ It was "not an avatar of the High Court at all".¹¹ "[T]he supervisory jurisdiction of the High Court, well known to Parliament as one of the great historic artifacts of the common law, runs to statutory tribunals both in their old and in their new incarnation unless ousted by the plainest possible statutory language".¹² That was not the case with the Upper Tribunal.

But, secondly, the question arose as to the extent of judicial review to be exercised. There was a case for treating the Upper Tribunal in the same way as any other reviewable body, subject to the exercise of discretion at the points of whether or not to grant permission to apply for review or to grant relief. This approach was, however, rejected. The scope of review was necessarily a matter of law. Invoking support from dicta of Lord Diplock,¹³ the Court of Appeal took the view that the rules of judicial review, always a creation of the judges, should be adapted to the changed circumstances produced by the 2007 Act. The new tribunal structure, while not an analogue of the High Court, was something greater than the sum of its parts.¹⁴ Judicial review of the Upper Tribunal should not extend to all errors. Only instances of "outright excess of jurisdiction" or a "denial of procedural justice"¹⁵ or a "denial of fundamental justice"¹⁶ should be reviewable.

(2) *Eba*

The Inner House in *Eba* recalled the historic basis of the supervisory jurisdiction of the Court of Session,¹⁷ its nature,¹⁸ including the lack of any requirement of permission to apply for judicial review, the bodies historically reviewable and unreviewable—including, in the latter category, the High Court of Justiciary and

⁷ *Eba* at para 65.

⁸ Section 25(1)(b) makes equivalent provision in relation to the Court of Session.

⁹ There had been some discussion of the possibility of judicial review in the Leggatt report (n 1 above).

See *Cart* at para 15.

¹⁰ Para 19.

¹¹ *Ibid.*

¹² Para 20.

¹³ In *R v IRC, ex parte National Federation of Self-Employed* [1982] AC 617 at 639-640.

¹⁴ *Cart* at para 42.

¹⁵ Para 4.

¹⁶ Para 36.

¹⁷ *Eba* at para 34.

¹⁸ Para 35.

certain “supreme” tribunals,¹⁹ and the general grounds of review, taking account both of the authorities maintaining the essential similarities with English practice and those (eg in relation to error of law) indicating possible differences.²⁰

As to the status of the Upper Tribunal, the Division took the view that it was “an inferior judicatory”.²¹ Its decisions were appealable to the Court of Session. Its inferior status was not affected by its possession of certain powers of judicial review. It was a tribunal (with lay members) rather than a court. There was no express statutory provision to exclude review.²² Furthermore, no test of “appropriateness” could be applied to restrict review of the Upper Tribunal. Whilst there might be no “precise principle” for exempting from judicial review the categories of court already mentioned, it seemed that:²³

... the only civil courts which the Court of Session has regarded as not amenable to its supervisory jurisdiction are courts which are in effect manifestations of itself. Against that background it would, in our view, not be right to exclude from judicial review on the ground of ‘inappropriateness’ a court or tribunal other than one which was, or was akin to, such a manifestation. The Upper Tribunal, albeit it has a wide and comprehensive jurisdiction in its specialist fields and is at the apex of the tribunal structure in those fields, is clearly not such a manifestation.

The Upper Tribunal was not an alter ego of the Court of Session.²⁴ And “[n]o question of discretion applies to the Court of Session’s jurisdiction”.²⁵ The Upper Tribunal was reviewable.

As to the respondent’s contention (upheld at first instance) that judicial review should be available only in exceptional circumstances, this was firmly rejected. A narrowing of the grounds might be appropriate in relation to “non-statutory” decision-makers such as ecclesiastical bodies and arbiters or adjudicators²⁶ but not in relation to statutory bodies.²⁷ The English courts might narrow the grounds of review on policy grounds but the Court of Session could not.

B. QUESTIONS FOR THE SUPREME COURT

Eba and *Cart* raise some intriguing questions for the Supreme Court, assuming that they do indeed unite in reaching “another place”. Briefly stated, these might include:

19 Paras 36-39.

20 Paras 40-46.

21 The terminology of Lord Shaw of Dunfermline in *Moss’ Empires v Assessor for Glasgow* 1917 SC (HL) 1 at 17.

22 Para 47.

23 Para 51.

24 Para 51.

25 Para 54.

26 Citing *inter alia McDonald v Burns* 1940 SC 376 and *Gillies Ramsay Diamond v PJW Enterprises Ltd* 2004 SC 430.

27 Paras 55-60.

- (1) How far is it desirable that the emerging divergence between the Scottish and English courts as to the availability of judicial review of the Upper Tribunal be terminated? If differences are to be retained, might this produce forum-shopping questions of the sort raised by *Tehrani v Home Secretary*?²⁸
- (2) If convergence is desirable, how far should that be a matter for resolution by the Supreme Court itself or, alternatively, by the UK Parliament?
- (3) If convergence is to be sought by the Supreme Court, in which direction should that court point? Assuming that the option of total non-reviewability of the Upper Tribunal is rejected, will the court reject the Court of Appeal's "legal policy" argument and prefer the First Division's adoption of the uncircumscribed grounds of review? If so, will the court reject a "legal policy" basis for such arguments in their entirety? Will the court adopt the First Division's reliance on the reasoning of the Lord Justice Clerk in *Gillies Ramsay Diamond* for the approval of narrower grounds of review – but only in respect of non-statutory bodies?²⁹ And how far will the Supreme Court acknowledge that convergence around unlimited reviewability might still leave the two jurisdictions in quite different places? There are strong arguments (based partly on different rules as to access to judicial review and the availability of remedies) for suggesting that being pushed back to the exercise of judicial discretion would leave the Court of Session much more constrained than the English High Court.
- (4) If the Supreme Court prefers instead the circumscription of the grounds of review, how comfortable will it be to reject arguments to the contrary from the First Division based on the "history and nature of the supervisory jurisdiction" of the Court of Session?³⁰
- (5) And, if indeed circumscribed grounds of review are proposed, what model of circumscription will be articulated? The pursuit of restricted grounds has been undertaken in other contexts and it may be noted, for instance, that, in relation to its review of EU measures in *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*,³¹ the European Court of Human Rights adopted a test of "manifest deficiency". That might avoid the confusion which has surrounded the deployment of "pre-*Anisminic*" grounds – both as to what that case³² itself decided and as to how it has subsequently been interpreted (differently) in the Scottish and English courts. Whatever formula is adopted, however, there are likely to be resulting uncertainties. Lord Reid argued in *Anisminic* itself that "there are no degrees of nullity".³³ So what is an "outright" excess of jurisdiction as opposed to an excess which is not "outright"? What is a "fundamental" denial of justice as opposed to one which is not?
- (6) What rationale would be articulated for treating the Upper Tribunal as a special case? Is it unique or are other such special bodies identifiable?

28 SC (HL) 1. See C Himsworth, "Inter-jurisdictional questions in judicial review" (2007) 11 EdinLR 277.

29 See C Himsworth "Inter-jurisdictional error of law in construction adjudication", 2010 JR 307.

30 *Eba* at para 65.

31 (2006) 42 EHRR 1.

32 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

33 At 170.

C. DYSFUNCTIONALITY

We may return, finally, to the opening sentence of this note by asking whether it is unreasonable to wonder whether, when Parliament creates a sophisticated new system of administrative justice, it is an unavoidable feature of the British constitutional order that it requires poor Ms Eba and Mr Cart (and others on their behalf) to go to the trouble and (presumably public) expense of litigation in three tiers of courts in two jurisdictions struggling to answer a fundamental but rather obvious question about the top tribunal's status? Was it beyond the collective imagination of our legislators to devise an answer and make appropriate statutory provision for it at the outset? Or have we to accept that Parliaments will always fear to tread in areas of such acute judicial sensitivity and leave it to the judges?

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(The author is grateful to James Harrison for comments on a draft of this note.)

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A Step Closer to Same-Sex Marriage Throughout Europe

For family lawyers, legal recognition of same-sex relationships was the “great debate” of the later years of the twentieth century.¹ The Netherlands led the way, in 2001, when it provided for same-sex marriage by the legislative route² and a number of other countries followed suit.³ In other jurisdictions, the courts were used to secure same-sex marriage,⁴ with the Supreme Court of Canada⁵ and the Constitutional Court in South Africa⁶ providing shining examples of how courts can protect the equality rights of minorities using constitutional provisions and the like.⁷ Yet

1 E E Sutherland, *Child and Family Law*, 2nd edn (2008) paras 11-063—11-107.

2 Dutch Civil Code art 30(1).

3 At the time of writing, the other countries are Argentina, Belgium, Iceland, Norway, Portugal, Spain and Sweden.

4 It is, of course, somewhat simplistic to present the law reform process as this stark contrast of approaches, since legislation will often have been prompted by litigation on aspects of same-sex relationships, legislation may face challenge in court and, once the court has pronounced on a need to provide for same-sex marriage, legislation follows.

5 *Re Same-Sex Marriage* [2004] 3 SCR 698.

6 *Minister of Home Affairs v Fourie* [2005] ZACC 19.

7 The United States Supreme Court has yet to address the issue, but it is likely to do so as a result of the lower court decisions in *Gill v Office of Personnel Management* 699 F Supp 2d 374 (D Mass 2010) and *Perry v Schwarzenegger* 704 F Supp 2d 921 (N D Cal 2010).

other jurisdictions adopted the compromise solution of creating a new form of relationship,⁸ the civil or registered partnership, carrying with it many or all of the legal consequences of marriage, but seeking to pacify (largely religious) opponents by avoiding the use of the magic word “marriage”. That this compromise fails to deliver true equality is clear and the debate continues.

*Schalk and Kopf v Austria*⁹ presented the European Court of Human Rights with its first opportunity to address the issue of same-sex marriage squarely. How did it fare? It was disappointing, but not wholly surprising, that it did not find states under any obligation to make marriage available to same-sex couples. Turning to whether states are obliged to provide them with an alternative means of gaining legal recognition of their relationships, the Court split 4-3 and, in some respects, the reasoning of the majority is deeply flawed. Nonetheless, the Court broke new ground in finding that the right to respect for family life (and not just the right to respect for private life) now applies to same-sex couples, suggesting that states must provide a mechanism for according legal recognition to same-sex relationships. Even on the Court’s own reasoning, it is arguably only a matter of time (perhaps some time) until the right to marry becomes a reality for same-sex couples throughout Europe.

A. THE FACTS OF *SCHALK AND KOPF*

In September 2002, Horst Michael Schalk and Johan Franz Kopf, an Austrian same-sex couple, followed in the footsteps of many other such couples around the world. They sought a marriage licence. Like many others, their application was rejected by the authorities on the basis that, under domestic law, marriage was competent only between two persons of the opposite sex. The couple appealed against that decision, moving through the various levels of the Austrian legal system, culminating in the rejection of their complaint by the country’s Constitutional Court in December 2003. Having exhausted their domestic remedies, the stage was set for them to take their case to the European Court of Human Rights.

Their complaint before the European Court was that, by denying them the opportunity to marry, which failing, to some other form of legal recognition of their relationship, Austria had violated their convention rights under article 12 (right to marry) and under article 14 (prohibition of discrimination) taken in conjunction with article 8 (right to respect for private and family life). A Registered Partnership Act came into effect in Austria in 2010 and, while the Austrian government was unsuccessful in using the legislation to have the applicants’ complaint struck out,¹⁰ the Act featured significantly in the case. Reflecting the magnitude of what was at stake,

⁸ In some states, the introduction of same-sex marriage was preceded by this step and jurisdictions vary over whether the new relationship is available only to same-sex couples or to all couples.

⁹ App No 30141/04, judgment of the First Section, 24 Jun 2010.

¹⁰ Paras 35-38.

one other government¹¹ and four non-governmental organisations¹² sought – and were granted – leave to intervene in the case.

B. DOES THE RIGHT TO MARRY APPLY TO SAME-SEX COUPLES?

The applicants' first claim, that they had a right to marry under article 12 of the European Convention, did not detain the Court long. While it accepted that "looked at in isolation", the words "men and women... have a right to marry" might be understood as supporting same-sex marriage, it noted that other substantive provisions refer to "everyone" or "no one".¹³ Thus, the express reference to sex had to be "regarded as deliberate",¹⁴ particularly when set in the context of the nature of marriage as it was understood in 1950 when the convention was adopted.¹⁵ The Court's own case law permitting post-operative transsexuals to marry was of no help either, since it simply reinforced the different-sex nature of marriage.¹⁶ Nor was the recently-enacted Charter of Fundamental Rights of the European Union of any help. Despite the fact that it had removed all reference to "men and women" from its guarantee of the right to marry,¹⁷ the European Charter's own commentary makes clear that it neither prohibits nor mandates the availability of same-sex marriage, preferring to leave the matter to member states.¹⁸ The fatal blow to the applicants' case was the lack of consensus amongst contracting states, with only six of the forty-seven permitting same-sex marriage.¹⁹ Thus, the Court concluded, unanimously, "Article 12... does not impose an obligation on [states] to grant a same-sex couple... the right to marry".²⁰ That being the case, there had been no violation of the applicants' article 12 rights.²¹

Thus far, the Court was dealing with the present, concluding that "as matters stand" the issue is one that should be left to regulation by contracting states.²² However, it went on to give hope for future developments when it accepted, in the light of the European Charter provision on the subject:²³

11 That the government was that of the United Kingdom reflects increased appreciation of the implications for domestic law of European Court decisions. Self-interest is a strong motivation and at stake were the domestic decision in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2006] HRLR 36 and protecting the Civil Partnership Act 2004 from challenge.

12 Para 5. All of the NGOs intervened in support of the applicants.

13 Para 55. In a concurring opinion, Judges Malinverni and Kovler rejected the idea that even "looked at in isolation" article 12 could be so understood.

14 Para 55.

15 For once, the Court made no reference to the convention as a "living instrument".

16 Para 59. In a welcome aside, the Court repeated the point, made in *Goodwin v United Kingdom* (2002) 35 EHRR 18, that the inability to conceive a child does not remove the right to marry: para 56.

17 Charter of Fundamental Rights of the European Union, OJ 2000 C364/1 (in force 1 Dec 2009) art 9.

18 *Schalk and Kopf* at para 60.

19 Para 58.

20 Para 63.

21 Para 64.

22 Para 61.

23 Ibid.

[T]he Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between people of the opposite sex.

In this, it signalled that it would be open to revisiting the issue once a different consensus emerged in Europe.

If article 12 did not guarantee the applicants the right to marry, could an argument be crafted, using article 14 in conjunction with Article 8, to give them that right? Again, this matter did not detain the Court for long. It is trite law that “the Convention must be read as a whole”.²⁴ If article 12, which expressly addresses the right to marry, does not currently guarantee access to the magic status to same-sex couples, then article 8, being “a provision of more general purpose and scope”, could not be used to create such a right.²⁵ Essentially, the Court took the, not unreasonable, position that one cannot get via the back door that which is unattainable through the front.

C. ARE STATES OBLIGED TO PROVIDE SAME-SEX COUPLES WITH AN ALTERNATIVE MODE OF GAINING RELATIONSHIP RECOGNITION?

If same-sex couples have no right to marry, is the state obliged to provide an alternative method of according legal recognition to their relationships? The second strand of the applicants’ case in *Schalk and Kopf* was that, by failing (until 2010) to provide such an alternative, the Austrian government had violated their rights under Article 14 in conjunction with Article 8. The Court divided 4-3 on that aspect of the case and the reasoning of the majority is hardly a model of clarity.

The majority began by exploring the extensive developments in European Court case law recognising the rights of homosexuals, lesbians and same-sex couples under the “respect for private life” leg of article 8.²⁶ They noted that, as recently as 2001 and due to the lack of consensus between states, the Court had stopped short of recognising any parallel “right to respect for family life”,²⁷ leaving states with a wide margin of appreciation in that area. However, in the light of the “growing tendency to include same-sex couples in the notion of ‘family’”²⁸ and European Union law developments recognising registered partnership, the Court concluded that:²⁹

[T]he relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.

²⁴ Para 101.

²⁵ Ibid.

²⁶ Paras 87-92.

²⁷ App No 56501/00 *Mata Estevez v Spain*, 10 May 2001 (inadmissible). Since *Karner v Austria* (2004) 38 EHRR 24, concerning succession to tenancy in the home, the Court had been able to avoid addressing the issue of “family life”.

²⁸ *Schalk and Kopf* at para 93.

²⁹ Para 94.

Having established the right to respect for family life, the majority then considered whether that right had been violated: that is, whether the failure to accord the applicants an opportunity to gain legal recognition of their relationship amounted to discrimination. The Court rehearsed the familiar test for breach of article 14, namely, that the applicants must demonstrate “a difference in treatment of person in relatively similar situations” where there was no objective or reasonable justification for the difference in treatment.³⁰ Since “same-sex couples are just as capable as different-sex couples of stable committed relationships”,³¹ the requisite similarity of situation was found to exist. Furthermore, as the majority reiterated, “just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification”.³²

Thus far, the reasoning of the majority appeared to be leading towards one, inescapable conclusion. However, instead of concluding, as did the three dissenting judges,³³ that there was, therefore, a violation of the applicants’ rights under article 14 in conjunction with article 8, they allowed themselves to be diverted. Noting that, as a result of the new Austrian Registered Partnership Act, the applicants could now gain legal recognition of their relationship, they concluded that there was no longer a live issue to consider.³⁴

Nor was the majority willing to criticise the Austrian government for its failure to provide this option sooner. While there was indeed, “an emerging European consensus towards legal recognition of same-sex couples”, it had “developed rapidly over the last decade”.³⁵ A majority of states still provided no such recognition and, thus, the lack of an “established consensus” meant that states continue to “enjoy a margin of appreciation in the timing of the introductions of legislative changes”.³⁶ Little wonder the dissenting judges accused their fellows in the majority of endorsing “the legal vacuum at stake”.³⁷

Where this left Herren Schalk and Kopf was clear. There had been no violation of their rights under article 14 in conjunction with article 8.³⁸ But where does this leave other same-sex couples who live in states that have not yet introduced any law enabling them to gain legal recognition of their relationships? Such states are now obliged to respect their right to family life and one way to do that would be to

30 Para 96.

31 Para 99.

32 Para 97, citing *Karner v Austria* (2004) 38 EHRR 24 at para 37.

33 In para 8 of their Dissent, Judges Rozakis, Spielmann and Jebens pointed out that, since it had been accepted that there was a right to respect for family life, same-sex couples and different-sex couples were similarly situated and the two groups were being treated differently, there was a breach of the applicants’ rights unless the Austrian government could produce a cogent reason for that difference. It had not done so. There was nothing further to say and margin of appreciation was of no relevance at this stage.

34 Para 103.

35 Para 105.

36 Ibid.

37 Dissent of Judges Rozakis, Spielmann and Jebens at para 9.

38 Para 110.

introduce a civil or registered partnership law, but it seems that the state in question may take its own sweet time about doing so, at least until a majority of states reach that position.

D. MUST THE CONSEQUENCES OF RECOGNITION BE EQUAL?

Registered partnership is not marriage and, thus, offering same-sex couples this alternative fails to deliver true equality, in the conceptual sense. However, at a more practical level, in offering this alternative, is a state bound to attach all the same legal consequences to registered partnership as flow from marriage? Given that the right to respect for family life now attaches to same-sex relationship just as it does to different-sex relationships, any difference in consequences will require justification. The majority of this court again side-stepped the issue, regarding it as beyond the scope of the case. While it drew a distinction between “material consequences” and “parental rights”, seemingly finding greater scope for the margin of appreciation to apply to the latter,³⁹ it did not explore the emerging case law applying the right to respect for private life to same-sex couples and parenting.⁴⁰ Full exploration of consequences was left for another day. That day may not be far off, since the Fifth Section of the court will have the opportunity to address recognition of same-sex relationships again in *Chapin and Charpentier v France*,⁴¹ a case challenging the adequacy of the French solution, the *pacte civil de solidarité*.

E. CONCLUSIONS

It is tempting to compare the cogent reasoning of the highest courts in Canada and South Africa in defending equality and securing the availability of same-sex marriage with the slower progress of the European court. Certainly, the reasoning of the majority in *Schalk and Kopf* was not the court’s finest work and, since it seems the applicants do not plan to appeal against the decision, the Grand Chamber will not have the opportunity to retrieve European jurisprudential honour. Nonetheless, it would be a mistake not to recognise the advances secured in this decision, both in extending the right to family life to same-sex couples and in opening the door to the right to marry to same-sex couples throughout Europe in the future. Given the evolutive nature of Convention rights, surely, it is only a matter of time.

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³⁹ Para 109.

⁴⁰ *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 47; *EB v France* (2008) 47 EHRR 21.

⁴¹ App No 40183/07.

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When Parliament Gets it Wrong: *Mykoliw v Botterill*

There is no getting away from the interpretation of statutes. However much our legislators (or, in truth, their draftspersons) try to cover every eventuality, there will be gaps remaining. However hard they try to be unambiguous, their efforts will be frustrated by clever lawyers finding or creating double meanings, obscure definitions and unlikely constructions. The interpretative requirements in section 3 of the Human Rights Act 1998 have enlarged the scope for finding and applying meanings that are apparently at odds with the words used and sometimes even with the intent with which they have been used. We are all getting used to dealing with provisions that require to be interpreted in an unusual way in order to avoid violating the ECHR. *Mykoliw v. Botterill*¹ involves a much rarer beast – a statutory provision which, it was clear to everyone, did not say what Parliament meant it to say. It involved that much-amended statute, the Damages (Scotland) Act 1976, and concerned a question that many previous courts have been faced with: who counts as “family” within the definition given in that Act?

A. THE BACKGROUND

In *Telfer v Kellock*² a woman was killed in a road accident and her (female) partner sought damages, claiming title to do so under para 1(aa) of Schedule 1 to the Damages (Scotland) Act 1976, on the ground that she was “living with the deceased as husband and wife”. Lady Smith dismissed the claim on the ground that the words “living with the deceased as husband and wife” indicated unambiguously a parliamentary intention to limit qualifying relationships to those between a man and a woman and that, because the Human Rights Act 1998 was not yet in force, the courts were obliged to give effect to this intention and could not reinterpret it to achieve ECHR compatibility. In *McGibbon v McAllister*,³ on the other hand, reinterpretation was indeed required because the 1998 Act was by then in force. The 1976 Act includes parents in the category of persons who can seek damages for non-patrimonial loss on the death of their child, and at that time it also provided that affinitive relationships were to be treated as relationships of consanguinity. This meant that step-parents had the same rights to sue as parents, as did parents-in-law.⁴ The pursuer in *McGibbon* was not a step-parent of the deceased but the mother’s cohabitant and his argument, that to give the statute its ordinary meaning would be to discriminate against him on the basis of his marital status, was accepted by Lord Brodie.

1 [2010] CSOH 84.

2 2004 SLT 1290.

3 2008 SLT 459.

4 See e.g. *Monteith v Cape Insulation* 1999 SLT 116.

B. MYKOLIW v BOTTERILL

Mykoliw v Botterill arose from the death of Kevin Michael Mykoliw, who was killed in a road accident. The defenders were sued by various surviving members of Mr Mykoliw's (slightly complex) family under the Damages (Scotland) Act 1976. The case came before Lord Pentland on the Procedure Roll on a motion of the defenders for dismissal of the claim brought by one of the pursuers, James Marshall. He was married to the deceased's mother and as such had been the deceased's step-father. The defenders sought to have his claim for non-patrimonial loss dismissed on the ground that he was not a member of the deceased's "immediate family", because the definition of that phrase had been changed since *McGibbon* and the legislation now unambiguously excluded all affinitive relations of a deceased person.

It was accepted that, prior to amendments to the 1976 Act made by the Family Law (Scotland) Act 2006, Mr Marshall would have had clear title to sue by dint of his status as step-parent. But the wording in the Act had been changed as a result of the recommendations of the Scottish Law Commission in their Report on *Damages for Non-Patrimonial Loss*⁵ where they had concluded that the existing definition of "immediate family" no longer appropriately reflected the variety of family structures that existed in Scotland today. The law as it stood was both over-inclusive and under-inclusive. It was over-inclusive in that it permitted pursuers to trace their claim through relationships of affinity even when there was in reality no genuine closeness with the deceased that would justify an award for non-patrimonial loss. And it was under-inclusive in that it excluded persons who did have that genuine closeness through having accepted the deceased as a child of their family. The Commission therefore recommended changing the test from the existence of an affinitive relationship to acceptance of the deceased as a child of the claimant's family. This would exclude, for example, a person who becomes the deceased's step-parent after the deceased grew up and left the parental home, but at the same time would normally include a person, whether or not married to or civil partner of the parent, who adopted a parenting role while the deceased was still a child being brought up in the parental home. The Scottish Executive (as the Scottish Government then called itself) announced its acceptance of these recommendations.

The Family Law (Scotland) Bill, as introduced in 2005, did not contain any provisions designed to achieve the recommended amendments in the 1976 Act, but as that Bill was making its way through the parliamentary process someone decided that it would be a convenient opportunity to amend the 1976 Act in the way the Commission had suggested. However, the wording used to achieve the aim was substantially different from that in the draft Bill attached to the Commission's Report. Section 35(5) of the 2006 Act added the "accepting adults" category of relatives to the list of relatives in section 10 and schedule 1. That was unproblematic. The difficulty arose with the attempt to exclude step-parenthood as the sole basis of the claim. Section 35(3) of the 2006 Act added a new section 1(4A) to the 1976 Act, providing bluntly and without qualification that "Notwithstanding section 10(2) of, and Schedule 1 to, this Act, no award of damages under subsection (4) above shall be made to a person related by affinity to the deceased". "Person related by affinity" was

⁵ Scot Law Com No 187, 2002.

further defined to include “a stepchild, step-parent, stepbrother or stepsister of the deceased”.

The result, on a literal reading of the amended 1976 Act, is that a person is given a right to claim damages for non-patrimonial loss if they had accepted the deceased as a child of the family but that right is blocked if they were related to the deceased by affinity. This was not what was intended. The intention was not to exclude step-parents absolutely, but to change the test that they had to fulfil, from one of affinity to one of acceptance. Mr Marshall in the present case had (he averred) accepted the deceased as a child of the family, but he was also related to the deceased by affinity. So the question for the court was this: could section 1(4A) be interpreted in a way that did not cut off his claim?

In my commentary to the 2006 Act⁶ I said this:

Though the new section 1(4A) superficially reads as an absolute bar on affinitive claimants, that strict interpretation must be rejected. For otherwise cohabitants who accept each other's children as children of their family would have a claim while spouses and civil partners who did so would not. Not only is this highly unlikely to reflect parliamentary intention, but it satisfies no legitimate aim. As such it is permitted, even necessary, for the court to read into the new section 1(4A) of the 1976 Act words such as ‘solely on the basis of the affinity’.

I elaborated on the point in “Rushed law and wrongful death”,⁷ which Lord Pentland found “illuminating” as he adopted the suggestion. What is interesting is that he did so using the Human Rights Act 1998 only as a subsidiary argument.

C. THE DECISION

Lord Pentland found that article 8 of the European Convention was engaged because the right to sue based on the existence of sufficiently close family ties with a deceased person is an important aspect of family life, even if it can only be exercised after the death of the family member.⁸ He then concluded that to deny persons in the position of Mr Marshall title to sue for the death of a relative accepted as a family member, but to allow an unmarried *de facto* parent the right to do so would be discriminatory and incompatible with article 14 of the ECHR when read with article 8 as achieving no legitimate aim.⁹ It followed that there was a requirement to read down section 1(4A) of the 1976 Act so that it was limited to situations where the only connection between the claimant and the deceased was the formal relationship of affinity.¹⁰

Lord Pentland had, however, already reached this result by applying the normal domestic canons of construction, which require the court to apply the literal meaning of statutory words unless to do so would lead to absurdity, anomaly or injustice. The literal approach in the present case would do just that. Counsel for the defenders

⁶ K McK Norrie, *The Family Law (Scotland) Act 2006: Text and Commentary* (2006) 90.

⁷ K McK Norrie, “Rushed law and wrongful death” (2006) 51 JLSS Apr/24.

⁸ *Mykoliw* at para 29.

⁹ Para 30.

¹⁰ Para 31.

argued that in such circumstances the remedy lay in legislative rather than judicial amendment of the clear words of the statute and in doing so they were arguing for a highly limited conception of the role of the courts.

Lord Pentland dismissed this argument out of hand. Given the choice between a literal and a sensible interpretation, he held that the court had the power to adopt the sensible interpretation especially where, as here, it was clear that the sensible interpretation consists with the intention of the Scottish Law Commission, who had explicitly stated that step-parents should be able to claim if they can prove that they had accepted the deceased as a child of their family.¹¹ What is remarkable about this case is that the sensible interpretation could only be achieved by Lord Pentland reading into the new section 1(4A) a qualification that does not actually appear. This was not a case of the court reading in words in order to make sense of a provision, or to resolve an ambiguity, but of a court actually changing its unambiguous meaning. This is “interpretation” only in a stretched meaning of that word, though perhaps no more stretched than is permitted under section 3 of the Human Rights Act 1998.

It was fortunate that the true intent behind the amendment had been expressed so clearly by the Scottish Law Commission, and that the Scottish Executive had accepted that their recommendations should be given effect without qualification, omission or revision. Not all cases of absurd statutory results will be as clear as this and courts in the future may well be faced with palpable absurdity but no clear guidance as to what rule to put in its place. The Human Rights Act 1998 of course provides guidance in cases where Convention rights are engaged, but that will not happen in every case and the courts will be left with having to construe the statute on the basis of what they think the legislation ought to say as opposed to what they know the legislature wanted it to say.

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Unmarried Fathers, Contact and Children’s Hearings: Exploring *Authority Reporter v S*

The Children (Scotland) Act 1995 introduced lawyers to the “relevant person”.¹ This replaced “parent”² to define an important group of persons within the children’s hearing system. Over the years, certain definitional ambiguities were resolved.³

11 Report on *Damages for Non-Patrimonial Loss* (n 5) para 2.40.

1 s 93(2)(b).

2 Social Work (Scotland) Act 1968 ss 77(2) and 94(1).

3 See e.g. *S v N* 2002 SLT 589 where it was held that foster carers fell within the definition.

However, an important one remained. The judgment of the Inner House of the Court of Session in *Authority Reporter v S*⁴ provides long overdue clarification that an unmarried father with an order for contact under section 11 of the 1995 Act is a “relevant person”.

A. THE STATUTORY FRAMEWORK

The status of relevant person confers on a person a suite of rights and obligations when a child is referred to a hearing. “Relevant person” is defined by section 93(2)(b) of the 1995 Act as:

- (a) Any parent enjoying parental responsibilities or parental rights under Part I of this Act;
- (b) Any person in whom parental responsibilities or rights are vested by, under or by virtue of this Act; and
- (c) Any person who appears to be a person who ordinarily (and other than by reason only of his employment) has charge of, or control over, the child.

A relevant person not only has an obligation to attend the hearing, being liable on summary conviction to a fine for failure to attend,⁵ but has the right to attend all stages of the hearing⁶ and to receive copies of the papers provided to panel members.⁷ Most importantly, perhaps, the relevant person has the right to appeal decisions of the hearing.⁸

B. THE FACTS

The case concerned S and L, both unmarried fathers without full parental rights and responsibilities under section 3 of the 1995 Act.⁹ Each father, however, had been awarded contact with his child by a sheriff court under section 11(2)(d), S on an interim basis. Prior to both hearings the respective children’s reporters decided that neither S nor L was a relevant person. S was not invited to attend the hearing for his child. L was, but as an invited person L’s attendance was at the discretion of the chairperson.¹⁰

Each hearing subsequently made a condition that the child should have no contact with his father. The order by the hearing in relation to contact superseded the order

4 2010 SLT 765. At [2010] CSIH 45, the decision is entitled *Knox v S; L v Ritchie*.

5 1995 Act s 45(9).

6 Unless excluded under section 46(1) of the 1995 Act.

7 Children’s Hearings (Scotland) Rules 1996, SI 1996/3261 r 5(3).

8 1995 Act s 51(1).

9 A father can obtain parental responsibilities and rights for their child if they are married to the mother at the time of the birth of the child, or subsequently, or if they are named as the father on the child’s birth certificate, where the birth is registered on or after 4 May 2006: 1995 Act s 3. Alternatively, they may enter into a Parental Rights Agreement with the child’s mother: 1995 Act s 4.

10 Children’s Hearing (Scotland) Rules 1996, SI 1996/3261 r 13(d).

for contact each father had obtained from the sheriff court.¹¹ Both S and L appealed the hearing decisions, in particular the fact that they had not been afforded the status of relevant person. In the case of S, the sheriff allowed the appeal on the basis that S was a relevant person and there had therefore been a procedural irregularity in the conduct of the hearing. In the case of L, on the other hand, the sheriff refused the appeal, holding that L was not a relevant person. L appealed the decision, as did the principal reporter in the case of S.

C. THE DECISION

The Inner House decided that both S and L should be regarded as relevant persons. The court first addressed the question of the proper statutory construction of the 1995 Act relating to parental rights and responsibilities. The court concluded that section 93(2)(b) could not be read so as to include unmarried fathers with a contact order.¹² The court preferred the technical argument advanced on behalf of the principal reporter, supported by counsel for the Lord Advocate, and stated that residence, contact, and specific issue orders should properly be described as orders “in relation to” parental rights and responsibilities, rather than orders imposing one of the range of parental rights and responsibilities.¹³ Favourable references were made to the approach of the courts in *P v P*,¹⁴ *Treasure v McGrath*¹⁵ and *Children’s Reporter v D*.¹⁶

This interpretation recognises the inherent distinction in section 11 between the types of orders a court can make. Section 11(2)(b) provides for an order imposing parental responsibilities and rights whereas sections 11(2)(c) and (d) allow the court to grant residence and contact orders respectively. The inclusion of section 11(12) presupposes a distinction between orders imposing parental rights and responsibilities and those regulating residence and contact. It provides that a person in whose favour a residence order is granted under section 11(2)(c) would therefore have parental responsibilities and rights. It is highly significant that there is no equivalent provision for contact orders. The interpretation also recognises the purpose of the legislation and the deliberate movement to the language of parental responsibilities and parental rights, the latter only existing to allow the person to fulfil the former.

The Inner House went on to address the question which naturally follows from this interpretation: is it compatible with articles 6 and 8 of the European Convention

11 Before the 1995 Act, it was trite law that the supervision requirement of a hearing superseded a court order: *Aitken v Aitken* 1978 SC 297. Section 3(4) of the 1995 Act now states that “[t]he fact that a person has parental responsibilities or parental rights in relation to a child shall not entitle that person to act in any way which would be incompatible with any court order relating to the child or the child’s property, or with any supervision requirement made under section 70 of this Act”.

12 Para 41.

13 Para 45.

14 2000 SLT 781.

15 2007 SCLR 447, 2006 Fam LR 100.

16 2008 SLT (Sh Ct) 21.

on Human Rights? It is notable that in both cases the hearing made a supervision requirement with a condition that the child should have no contact with their father.¹⁷ The primary question which occupied the Inner House was whether this constituted a determination of the father's "civil rights" under Article 6.¹⁸ The court concluded that it did, on the basis that any decision taken by the hearing to regulate contact which would "materially interfere with the exercise of that right" could amount to a determination of the right.¹⁹

This judgment is in direct contrast to previous *obiter* comments from the Inner House in *Principal Reporter v K*,²⁰ where it was said that before a hearing could be said to be making determinations regarding a person's "civil rights", this person would have to be a person with parental rights and responsibilities, either by virtue of legislation or a court order.²¹ A similar position was taken by the European Court in *McMichael v United Kingdom*.²² A distinction between the fathers in *K* and *McMichael* and those in *S* was made by the Inner House, in that *S* and *L* had taken the formal step of obtaining a contact order, which *K* and *McMichael* had not. However, this distinction cannot hold for *K*. The judgment in that case narrates a series of child welfare hearings over the course of a three year period where interim contact orders were made and subsequently suspended pending further proceedings. Furthermore, during one period of recall a hearing made a supervision requirement with a condition of no contact with the unmarried father, just as there had been in the cases of *S* and *L*.

Given that a contact order is not the same as an order for parental rights and responsibilities, and that a person can hold a contact order whilst at the same time not possessing full parental rights and responsibilities, this decision can be viewed as extending the previously recognised range of persons who are capable of having a determination made of their "civil rights" by a hearing.

The Inner House directly addressed the principal reporter's submission that the available remedy was for the unmarried fathers to make an application to the court for an award of parental rights and responsibilities. The Court concluded that while such an argument has a place in relation to article 8, it had no place in relation to article 6, as rights under the latter article are unqualified.

Having reached this conclusion in relation to article 6, the Inner House found it unnecessary to make a determination in relation to article 8. In *obiter* comments, however, the Inner House indicated that it was unlikely the interpretation of section 93(2)(b) was incompatible with article 8.

17 s 70(1).

18 A Children's Hearing is a tribunal which can determine civil rights: *S v Miller* 2001 SLT 531.

19 Para 51. The court did not regard the fact that *S*'s contact order was on an interim basis as making a difference in this respect.

20 2010 SLT 308. It should be noted that this case is the subject of appeal to the Supreme Court and was argued on 20 October 2010. The judgement is awaited at the time of writing.

21 Para 78.

22 (1995) 20 EHRR 205. The European Court held that the unmarried father's article 6 rights had not been violated as he had not taken the requisite steps required to be legally recognised as the child's father, this requirement being reasonable and proportionate: para 77.

It is difficult to argue against the proposition that the article 6 rights of an unmarried father who possesses a contact order are engaged when a hearing seeks to make determinations in respect of that father's right to contact. The question is ultimately one of fairness. Is it fair that this father does not have a right to notification of the hearing, to attend the hearing to present information to the forum, as in the case of S? Is it fair that the father, even if he knows of the hearing, is only permitted to attend parts at the discretion of the chairperson, as in the case of L? Is it fair that the father's right to contact is then interfered with, or even suspended, by the decision of a hearing? The answer to all these questions has to be in the negative. It was argued by the principal reporter that a contact order did not create a right to contact; it simply regulated the arrangements for a child to maintain contact with another person. This argument was rejected by the court. While a contact order does not create a "parental right", it nonetheless creates an enforceable legal right in that the order for contact can be enforced by the unmarried father if not adhered to.

The judgment of the Inner House appears to focus on the civil right only being infringed when a hearing seeks to make a determination in relation to the contact being exercised by the unmarried father. A strict reading of this approach would mean that the unmarried father's relevant person status only commences if the hearing seeks to make a determination in relation to his contact. On a purely practical level, this narrow approach should not be taken. Not every hearing will make a determination in relation to contact, although every hearing which decides to impose a supervision requirement is obliged to consider the need for a condition of contact.²³ A restrictive approach would not give the unmarried father the right to participate in the obligatory discussion about the need for a condition of contact. Furthermore if relevant person status were to change during a hearing, this would necessitate the hearing being continued for the "new" relevant person to receive notification, if not present, and even if present to receive the papers to which he then becomes entitled. It is conceivable that continuing the hearing could be contrary to the best interests of the child, or even to his detriment, the paramount consideration of the hearing.²⁴

Given the conclusion reached regarding article 6, the court considered whether the 1995 Act could be construed in a way so as to avoid the incompatibility, in accordance with section 3(1) of the Human Rights Act 1998. Helpfully for the Court it was a matter of agreement amongst all parties to the action that the legislation could be regarded as compatible if section 93(2)(b)(a) were to be read as "Any parent enjoying parental responsibilities or parental rights *or a right of contact in terms of a contact order* under Part I of this Act" (the italicised words being an interpolation). In light of this the Inner House found it unnecessary to make a declaration of incompatibility. This wording ensures that fathers who are not, for whatever reason, exercising their right to contact remain included within the definition. It also ensures that only those who have taken the formal step of securing a contact order are included.

²³ 1995 Act s 70(2).

²⁴ 1995 Act s 16.

D. CONCLUSIONS

The clarification of the Inner House in *S* is to be welcomed in that it allows the hearing system, a creation of the 1960s, to continue to adapt to the increasing diversity of Scottish family life. The decision supports the underlying philosophy of the hearing system, to take decisions in the best interests of the child with the participation of not only the child, but also the key people in the child's life. The decision ensures that a father who has taken a formal step to have an active part in the child's life can participate in the hearing regardless of his marital status. However, on a wider level, is such a substantial statutory amendment by judicial decision something to be welcomed? In this respect the Children's Hearings (Scotland) Bill, progressing through the Scottish Parliament at the time of writing, provides the ideal opportunity formally to amend the current statutory definition.

Alyson Evans

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Faulty Goods, Rejection and Connected Lender Liability

In the latest edition of *Atiyah's Sale of Goods*, published early in 2010, the editors contrast the relative quantity of recent Scottish cases on sale of goods with a dearth in England and Wales.¹ The Scottish lead was maintained as the year progressed, with no fewer than three significant cases decided in the Court of Session. This note will deal with two of them.²

A. *DOUGLAS v GLENVARIGILL CO LTD*

The first of these, *Douglas v Glenvarigill Co Ltd*,³ is a classic sale of goods case about a defective car and the buyer's right of rejection, but is also noteworthy as the first Court of Session discussion, albeit brief and inconclusive, of the consumer's repair

¹ J N Adams and H MacQueen, *Atiyah's Sale of Goods*, 12th edn (2010) xii-xiii.

² The third is *CMS Scotland Ltd v Ing Lease (UK) Ltd and Mann Island Finance Ltd* [2010] CSOH 39 on a customer's loss of the right to reject faulty goods after allowing the supplier to attempt repair. It is more a decision on its facts than on the law.

³ [2010] CSOH 14, 2010 SLT 634.

and replacement remedies under the Consumer Sales Directive 1999.⁴ The basic problem for the buyer of the faulty Audi in the case was that the defects in question, although serious, did not manifest themselves until over a year after delivery and rejection was not intimated for another 15 months (although in the meantime there was a good deal of to-ing and fro-ing between buyer and seller in efforts to have the problems sorted out).⁵ Lord Drummond Young, having decided on the expert evidence that the defect existed at the time of delivery, and that the breach was lack of durability, carefully reviewed the Scottish authorities on rejection under the Sale of Goods Act 1979, and decided that:⁶

... rejection is a relatively short-term remedy, and is simply not available when a latent defect manifests itself for the first time more than a year after delivery; in no reported case has rejection been permitted after such a period.

In the case of a latent defect, while time begins to run as soon as the goods are delivered, some interval may elapse with the buyer still entitled to reject; but this does not mean that the time period begins to run only when the defect is discovered. The Sale of Goods Act provisions speak only of a “reasonable time”, and do not refer to the emergence of latent defects in this context. Thus the buyer’s rejection in this case was too late, a decision which Lord Drummond Young said he reached “with some regret”,⁷ given the seriousness of the breach. But the buyer could still claim damages for the breach. It should be noted, said the judge, that:⁸

... rejection is a relatively drastic remedy, in that it involves return of the goods and the whole of the price. At a certain stage, commercial closure is required, to permit the seller in particular, but also the buyer to some extent, to arrange his affairs on the basis that the goods have been effectively sold.

Counsel for the pursuer went on to argue, in submissions that were apparently “not detailed”,⁹ that the buyer also had a right of rejection as rescission under section 48C of the Sale of Goods Act, i.e. one of the remedies introduced to the Act in implementation of the Consumer Sales Directive.¹⁰ Lord Drummond Young noted that there appeared to be differences between “the traditional remedy of rejection” and the new one of rescission: “in particular, replacement or repair must have been unavailable or unsuccessful, and account must be taken of the use that the buyer has had of the goods since delivery”.¹¹ But he indicated that at this stage in the case he was

4 Parliament and Council Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12.

5 It also appears from Lord Drummond Young’s opinion (at para 3) that the car in question was the buyer’s infrequently used third vehicle, explaining why it took so long for the defect to come to his attention.

6 Para 36.

7 Para 36.

8 Para 34.

9 Para 37.

10 See further M Hogg, “The consumer’s right to rescind under the Sale of Goods Act: a tale of two remedies” 2003 SLT (News) 277; *Atiyah’s Sale of Goods* (n 1) 522-526.

11 Para 37.

not willing to hold that the new rescission remedy was available to the buyer. Since however the action was a commercial one, and procedural flexibility was therefore required, he put the case out by order so that both parties could make further submissions. Given the history of failed attempts by the seller to repair the vehicle and offers to replace the vehicle refused by the buyer narrated in Lord Drummond Young's opinion,¹² there was clearly plenty of room for further discussion. But the opportunity was not taken up by the buyer, and the litigation accordingly ended with the point left unexplored.

It seems pretty clear that the consumer in this case did not have much if any knowledge of his rights as a buyer under any law, and that he was not well treated by the seller, whether or not the latter too knew what the law provided. It is also regrettable that better use was not made of the European rules from the outset in *Douglas*. The entry of the Consumer Sales Directive remedies into the equation may owe something to the fact that as it was heard Lord Drummond Young as Chairman of the Scottish Law Commission was also participating in the preparation of what became in November 2009 the Law Commissions' joint report on consumer remedies for faulty goods, where the integration of the Directive with the traditional remedies of the Sale of Goods Act is proposed.¹³ The joint Report thus makes recommendations on consumer remedies which may be summarised as retention of the right to reject; a normal period of 30 days for the right to reject to last; an entitlement to ask for a refund or price reduction after one failed repair or one failed replacement; retention of the protection for consumers who purchase goods with minor defects; the abolition of deduction for use in relation to rescission; and continuation of the position that the time limits for bringing claims should continue to be those which apply to general contractual claims.

The first of these recommendations goes directly against European Commission proposals in a new Consumer Rights Directive to confine consumers' remedies to those of repair and/or replacement unless the repair/replacement remedy has first been exhausted, and not to allow Member States to go further than this, thus entailing the loss of the consumer buyer's current right to reject unsatisfactory goods in the United Kingdom. The dispute remains unresolved at the time of writing.¹⁴

B. *DURKIN v DSG RETAIL LTD AND HFC BANK LTD*

The second case, *Durkin v DSG Retail Ltd and HFC Bank Ltd*,¹⁵ is a decision in which the First Division of the Court of Session tackled the tricky issue of connected lender liability under section 75 of the Consumer Credit Act 1974 and decided that

¹² See paras 4-5.

¹³ Law Commission and the Scottish Law Commission, Report on *Consumer Remedies for Faulty Goods* (Law Com No 317; Scot Law Com No 216, 2009).

¹⁴ October 2010. On the proposed Consumer Rights Directive, see Commission (EC), "Proposal for a directive on consumer rights" COM (2008) 614 final, 8 Oct 2008, available at http://ec.europa.eu/consumers/rights/cons_acquis_en.htm.

¹⁵ [2010] CSIH 49. The case was appealed from Aberdeen Sheriff Court, the decision in which on the buyer's right of rejection is noted in *Atiyah's Sale of Goods* (n 1) at 504.

under the section a consumer buyer's rescission of a contract of sale of faulty goods (a laptop computer) did not have the effect of also rescinding the connected loan contract by means of which the price was paid to the seller. The pursuer's claim against the creditor in delict (made on the basis that his refusal to repay the loan had led to his being put on credit blacklists and being as a result unable to buy a property in Spain until after the credit registers had been put right, when the property was over £100,000 more expensive) was also rejected by the court.

The decision on section 75 is a controversial one, turning essentially on the view that the phrase "like claim" in the section—the consumer who has a claim under the sale contract has a like claim against the connected lender—does not reach rescission (i.e. termination of the contract) but only monetary actions such as damages. While the *language* of the 1974 Act gives much support to the view of the First Division—e.g., rescission is not so much a "claim" as a "right" (as section 102 of the Act puts it); again, how can a lender be jointly and severally liable to rescission, as section 75 seems to require?—it is not clear that the *policy* of the Act in section 75 is satisfied. It is a very odd result if the debtor continues in effect to have to pay for rejected goods not conforming to the requirements of the contract, notwithstanding the legal form of the transaction under which the liability incurred is that of a loan repayment. The consumer's natural instinct will be to think there can be no ongoing liability to pay; but, as the pursuer's experience vividly illustrates, if the law is against that, the consequences of the consumer following instinct can be pretty horrible.

As the present writer attempted to point out long ago,¹⁶ section 75 tries to achieve the same result in connected sale and loans as would have followed in the typical hire-purchase transaction. In hire-purchase, the creditor buys the goods from the supplier, and then hires them to the debtor, who pays instalments until the purchase price is completed and then becomes the owner. In hire-purchase, if the goods are not conform to contract, the debtor's rejection and rescission would be good against the creditor, from whom payments made would be recovered and to whom payments to be made would no longer be due. The creditor of course would then have recourse against the supplier, probably on the same grounds of the goods' non-conformity as a term of the contract under which the creditor bought the goods from the supplier. So there is something in the argument that the policy of the Act is given best effect in connected sale-and-loan contracts by finding that when the buyer-debtor rescinds the sale contract, s/he can do the same with the loan contract. The creditor should also be able to recover the money it has in fact paid to the supplier, either under the contract it has with the supplier or, if need be, under the law of unjustified enrichment (or restitution, in England).

It should also be noted (as it is in the First Division's opinion, but only in summarising counsel's arguments)¹⁷ that if the debtor has made any contractual payment to the supplier, then rescission of the supply contract will involve the

16 See H L MacQueen, "Hire purchase and connected lender liability" 1984 SLT (News) 65.

17 Para 43.

monetary claim to repetition of those payments;¹⁸ and under section 75 that claim can be exercised against the creditor and set off against the liability under the loan. It might be arguable that in connected sale-and-loan cases the debtor who has rejected the goods also has the right to repetition of the full price even although that price was *de facto* paid by the creditor; the supplier who has been paid for goods sold surely cannot deny the debtor-buyer repetition of that price on the grounds that the payment was actually made by a third party. If this is right, then exercising a “like claim” against the creditor will again simply involve extinguishing the loan obligations. It is by no means clear that the suggested policy argument can trump the argument from the language of the Act; but it is as clear from the First Division’s decision as it was to the present writer in 1984 that “the 1974 Act has not made all other law on sale of goods and breach of contract irrelevant. The Act must be considered against the wider legal background”.¹⁹ The policy argument is not wholly unsupported by legal ones.

Two final thoughts. The consumer, Mr Durkin, bought his laptop from PC World in 1998. It took 12 years for his case to get as far as Parliament House. No doubt there are many reasons for this, but how many consumers would or could last this long in pursuit of their claims? The other is the complete lack of customer care displayed by the supplier and the creditor (in particular) in dealing with Mr Durkin’s claims at the outset of the problem. For that reason alone, one hopes the First Division’s is not the final word on the subject.²⁰

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Mutuality, Retention and Set-Off: *Inveresk plc v Tullis Russell Papermakers Ltd*

A. THE PROBLEM OF RECIPROCITY IN CONTRACTUAL OBLIGATIONS

Mutuality provides the most important principle governing the relationship between breach of contract and contractual performance. It can justify the withholding of performance as a response to breach and explains when performance by one party may be considered conditional upon performance by the other party because their

18 See W M Gloag, *The Law of Contract*, 2nd edn (1929) 59-60. Cf W W McBryde, *The Law of Contract in Scotland*, 3rd edn (2007) paras 20.142-143.

19 MacQueen (n 16) at 67.

20 It is understood, however, that lack of resources means that there will be no appeal to the Supreme Court by Mr Durkin.

obligations are reciprocal in nature. Nevertheless, since receiving detailed judicial elaboration by the House of Lords in *Bank of East Asia Ltd v Scottish Enterprise*,¹ a tension has arisen over the precise extent to which obligations on each side of a contract should be considered reciprocal between the parties and therefore to be treated as direct counterparts. Retention – the withholding of performance – is only permissible in this context when the obligations are counterparts. The question is whether the contract should be seen in essence as an indivisible unity in which all obligations on one side are normally counterparts of those on the other, or as a structured set of distinct obligations which may or may not be counterparts of one another. Interpreting the terms of the contract to elicit the intentions of the parties plays a crucial role, of course, but once this is done the scope of the principle of mutuality becomes fundamental in determining the rights of the parties once a breach has occurred.

In this regard, *Bank of East Asia* and the subsequent Inner House case of *Macari v Celtic Football and Athletic Co Ltd*² seemed to mark a significant clarification of how the doctrine should be applied, emphasising that obligations should be contemporaneous as well as reciprocal, and that not all obligations on one side of a contract were automatically counterparts of those on the other. In both cases obligations in particular contracts were distinguished as *not* being counterparts of one another, meaning that parties in breach were *not* able to justify withholding performance of the obligation in question. However, a series of opinions by Lord Drummond Young, sitting in Outer House cases such as *Hoult v Turpie*³ and *Purac Ltd v Byzac Ltd*,⁴ has subsequently sought to revive an older emphasis on the unity of the contract. A substantial divergence of view about the application of the mutuality principle therefore opened up, awaiting further clarification from an appellate court.

B. THE SCOPE OF THE DECISION IN *INVERESK*

In *Inveresk plc v Tullis Russell Papermakers Ltd*⁵ the Supreme Court has provided an answer which sides with the unity of contract approach but also extends the application of mutuality and retention in important respects. However, it also went on (in Lord Rodger's judgment) to examine quite independently the scope of retention as a wider remedial category in its own right, and for which the principle of mutuality is only one of a number of possible grounds which also includes set-off, or compensation. This has allowed the interaction between mutuality, retention and set-off to be considered, providing very helpful elucidation of a highly technical and complex area in which substantive rights interact with procedural rules as well as the equitable jurisdiction of the court. Whilst Lord Hope's judgment is important

1 1997 SLT 1213.

2 1999 SC 628.

3 2004 SLT 308.

4 2005 SLT 37.

5 [2010] UKSC 19, 2010 SLT 941.

from a doctrinal point of view because of its focus upon the scope of mutuality in justifying retention, Lord Rodger's makes a significant contribution in explaining how retention may also arise under different criteria in the context of set-off, and how this differs from but may interact with retention justified on the basis of mutuality.

C. THE DISPUTE IN *INVERESK*

The facts of *Inveresk* posed a new problem. A sale was concluded between paper manufacturers, but the overall agreement was constituted by two separate contracts which addressed different aspects of the agreement. One contract provided for the sale by Inveresk to Tullis Russell of intellectual property rights to certain brands of paper, associated customer information and related assets (the Asset Purchase Agreement). Payment was by way of an Initial Consideration (£5 million) with an Additional Consideration to follow calculated according to the volume of certain sales achieved by the buyer in the year or so following the sale. An important aspect of the sale was to impose further obligations on the seller, Inveresk, under a further contract (the Services Agreement) which required Inveresk to continue to manufacture, distribute and sell certain products for several months after the sale, thus safeguarding the maintenance of the value of the brand, and facilitating the transfer of customer business and integration of manufacturing and distribution of the product into the operations of the buyer, Tullis Russell. In return, further sums were payable by Tullis Russell to Inveresk under the Services Agreement. The litigation arose because Inveresk raised an action for payment of the Additional Consideration against Tullis Russell, who defended the claim on two grounds: first, that the Additional Consideration had not been determined under the relevant contractual provisions, and secondly, even if it had been, it was nevertheless entitled to withhold payment since Inveresk was in breach of the Services Agreement. Tullis Russell raised a separate action for breach of contract in this regard. Lord Hope addressed the first ground, and in an exhaustive and convincing analysis based on detailed interpretation of the contract terms concluded that the Additional Consideration had not been determined in accordance with the contract, and thus was not yet payable. The action was to be remitted back to the Commercial Court for further procedure to resolve this question. However, the wider significance of the Supreme Court's decision lies in the *obiter* remarks of Lord Hope and Lord Rodger concerning the second ground.

D. MUTUALITY

Tullis Russell's submission was that even if the Additional Consideration *were* to be ascertained it was entitled to retention of this payment under the Asset Purchase Agreement "pending" payment of its claims for breach of contract under the Services Agreement. The problem was that the matters in dispute between the parties related to obligations which had been enshrined in two separate contracts. The argument of Inveresk was twofold: first, retention could only operate "where the respective

claims arise out of one contract”, as opposed to “two contracts, albeit both arising from a single transaction”,⁶ so obligations constituted in separate contracts could not be counterparts; secondly, in any event, even if the contracts were treated as a unity, the obligations in question were *not* counterparts of each other.

Lord Hope decisively rejected both arguments. On the first, he sided with the approach of Lord Glennie in the Outer House in rejecting the formalism of Inveresk’s submission that obligations in one contract could not be regarded as counterparts of those in another. Instead he stressed an “overall agreement” or “same transaction” approach, grounded quite simply in giving effect to the intentions of the parties and recognising that one agreement may for various legitimate reasons be given effect through two or more separately constituted contracts or “contractual documents”. Nothing could be automatically assumed about the intentions of the parties from the structuring of their agreement or “transaction” into more than one such contract. Form alone was not determinative. Lord Hope observed that “the question in each case of retention will be whether the obligations that are founded on, *wherever they are to be found*, are truly counterparts of each other. It goes without saying that they must both be part of the same transaction, as there can be no mutuality between two or more transactions each of which has a life of its own” (emphasis added).⁷

On the second argument, however, Lord Hope disagreed with Lord Glennie’s application of the mutuality principle and concluded that the obligations in question were indeed counterparts. Why? Lord Glennie had viewed the obligations in question as lacking reciprocity and contemporaneousness because they related to distinct stages of the transaction. However, in Lord Hope’s eyes, this gave insufficient weight to the “overall purpose and effect of the transaction”. Instead, “the guiding principle is that the unity of the overall transaction should be respected. The analysis should start from the position that all the obligations that it embraces are to be regarded as counterparts of each other unless there is a clear indication to the contrary”.⁸ It was “unrealistic” to treat the transaction as “divisible into a series of separate and unrelated compartments. The obligations undertaken by Inveresk were all designed to serve the same end”.⁹

E. RETENTION AND SET-OFF

Lord Rodger agreed with Lord Hope’s analysis of mutuality but devoted his judgment to expounding what he characterised as a further and wholly distinguishable basis alongside that of mutuality for Tullis Russell’s retention of any payment under the Asset Purchase Agreement. This basis was the law of set-off. In doing so Lord Rodger was highly critical of counsel for appearing to overlook the existence of this second basis for retention. He applied this criticism to the Inner House even more forcefully,

⁶ Para 27.

⁷ Para 36.

⁸ Para 42.

⁹ Para 45.

rejecting their apparent “confining” of the role of retention to mutual obligations and noting that “the approach of the Extra Division conflates two different legal doctrines” which Scots law “unhelpfully” calls retention in both cases.¹⁰ In a sense it is understandable how this mistake could arise, since retention *under a contract* arises as a doctrine expressing the relevant rules and principles governing the conduct of the parties in relation to the principle of mutuality. However, it also arises outside contract law as a doctrine governing the enforcement of claims in relation to the operation of set-off. The wider point of Lord Rodger’s judgment is simply to emphasise that as retention is a doctrinal category in its own right and not a single doctrine coextensive with or simply derived from mutuality, considering it systematically as a separate category is necessary in order to expose clearly to view the existence of “two different types of retention”.¹¹

Whereas retention based on mutuality is an entitlement of a contracting party, Lord Rodger points to a second form of retention based solely on the equitable jurisdiction of the court and involving the temporary procedural suspension of a payment claim pending ascertainment of a counterclaim arising from some other obligation. Lord Rodger expresses the anxiety that “there is a risk that its existence will continue to be overlooked”.¹² This analysis might seem at first sight rather startling, especially to those who have equated retention simply with mutuality. In fact it draws upon a well-established body of law, and one clearly stated in modern academic works as well as in the older authorities helpfully discussed by Lord Rodger.¹³ However, it is one which is normally treated within the category of set-off and as such might appear to have no direct relevance to claims based on mutuality. Indeed, it would seem that counsel simply failed to think beyond the principle of mutuality. This is surprising, given that Tullis Russell was simultaneously pursuing its own breach of contract claim against Inveresk, meaning that the availability of set-off would always have been relevant. This omission could have had major repercussions had the Supreme Court followed Lord Glennie in the Outer House in viewing the obligations between the parties as not being counterparts, because the law of set-off would still have provided a further possible basis for withholding payment to Inveresk. Indeed Lord Rodger indicated that if it had been pleaded, the circumstances in *Inveresk* were “potentially, sufficiently special to justify a departure from the general rule” so that the court would have permitted retention of the Additional Consideration on this ground.¹⁴ Essentially Lord Rodger’s judgment is a sharp reminder that the law of set-off ought to have been considered in formulating Tullis Russell’s defences, since there is an equitable power in the court exceptionally to defer consideration of a claim for

¹⁰ Para 57.

¹¹ Paras 56, 57 and 59.

¹² Para 77.

¹³ W M Gloag and R C Henderson, *The Law of Scotland*, 12th edn (2007) paras 3.32 and 10.15; W W McBryde, *The Law of Contract in Scotland*, 3rd edn (2007) para 25.57; W A Wilson, *The Scottish Law of Debt*, 2nd edn (1991) paras 13.5 and 13.9.

¹⁴ Para 112.

payment when this may be met by a defence of set-off in relation to a claim for a debt which can imminently be made liquid.¹⁵

F. CONCLUSION

Inveresk would seem to bring authoritative clarification to the question when one contractual obligation should be considered the counterpart to another. However, in an important sense the Supreme Court has simply restored the traditional emphasis on the unity of the contract to be found in much older cases such as *Turnbull v McLean*, but slightly obscured by the more recent approach in *Bank of East Asia* and *Macari*.¹⁶ There is less inconsistency in this than might appear, since the problem for the courts is that different types of contract bring out different aspects of the mutuality principle. In some contracts (such as an employment contract) there will be obligations with no counterpart at all, whilst in others the performance obligations will often be structured in stages which might lack contemporaneousness (such as a building contract) or might not (such as a sale). The doctrine is therefore re-framed to help make sense of its application in each new context, but without necessarily intending any innovation. Nevertheless, *Inveresk* has innovated by establishing a presumption that obligations are counterparts, and the question will simply be whether it is sufficiently clear in future cases how this may be rebutted. Lord Hope referred to the need for a “clear indication to the contrary”.¹⁷ The other new element in *Inveresk* is the stress on a purposive approach which focusses upon obligations within an overall “transaction”, however constituted in terms of separate contracts. This aligns well with the modern approach to related areas such as contractual interpretation, bringing to mind Lord Wilberforce’s regard in that context for “the commercial purpose of the contract”.¹⁸ Again, the question will be whether the concept of “transaction” has been clearly enough defined and conceptualised, or whether it will give birth to a new area of ambiguity and uncertainty.

Regarding retention, Lord Rodger’s dismissal of “the erroneous basis that in Scots law the whole matter is regulated by fixed rules and that the court has no power to intervene where it would be equitable to do so”¹⁹ should not be seen to have any adverse impact on the availability of retention justified by mutuality. It is clearly directed towards the operation of set-off. However, Lord Rodger’s decision to adopt retention itself as the principal category around which to structure his discussion might risk causing some confusion, given that his objective is to articulate two very distinct “doctrines” of retention which have little in common with one another in doctrinal or policy terms. The policy behind mutuality relates to promoting the performance of contracts, whereas the policy of set-off is “to avoid a multiplicity of

¹⁵ Paras 79 and 83.

¹⁶ *Turnbull v McLean* (1874) 1 R 730.

¹⁷ Para 42.

¹⁸ *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989 at 995.

¹⁹ Para 52.

actions, and to save unnecessary expense”.²⁰ In some ways, Lord Rodger is simply reviving an older category of treatment which was used by Gloag and Irvine in their discussion of “the law of retention of debts”.²¹ However, given the different basis for each type of retention, a taxonomy based on different “doctrines” of retention might be less clear than one in which the main level of analysis relates to the substantive basis for the retention in question, i.e. mutuality, or set-off. In other words, it is not so much that retention was misunderstood in *Inveresk* as that set-off was overlooked. On the other hand, it cannot be denied that the unfortunate omission of the set-off argument in *Inveresk* would have been avoided under Lord Rodger’s systematic analysis of retention.

A further interesting point also emerges from Lord Rodger’s judgment, which flows from his analysis of how breach is “made good” through damages. If *Inveresk* were held to be in breach of their obligations to Tullis Russell, then “by paying . . . damages, they, in effect, make good their failure to perform their obligations under the Services Agreement and become entitled to the Additional Consideration”.²² Thus a right of retention grounded in mutuality does not necessarily persist for ever, if the party who retains performance progresses to completion a claim for damages. This important point is not always made clear in discussions of the scope of mutuality, and Lord Rodger’s elaboration of it is extremely valuable. Damages purify the breach in question, and thereby release the party in breach to sue on the contract. In practice this may facilitate set-off. However, it is significant that whether this happens or not is within the control of the innocent party – it may decline to pursue its damages claim, as in *Graham v United Turkey Red*,²³ in which case the contract-breaker does remain permanently barred from pursuing its own contractual claim. This may effectively lead to a disproportionate “forfeiture” in cases where that contractual claim exceeds the loss which could have been claimed in damages,²⁴ though if the contract has been rescinded *Graham* suggests that a remedy *quantum lucratus*, i.e. in unjustified enrichment, may nevertheless provide some redress (only if it is pleaded, of course, which in *Graham* it was not). Lord Rodger’s contribution is therefore not only to elucidate the wider remedial category of retention and to stress the role and breadth of the equitable power of the court in the context of set-off, but also to elucidate the complexity of the ways in which retention, mutuality and set-off may interact with judicial remedies and the wider law of obligations.

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(I am very grateful to my colleagues John McLeod and Iain MacNeil for discussing the case with me and commenting upon a draft of this note.)

²⁰ *Burt v Bell* (1861) 24 D 13 at 14 per the Lord President (McNeill); McBryde, *Contract* (n 13) 745.

²¹ W M Gloag and J M Irvine, *Law of Rights in Security* (1897) 304.

²² Para 76.

²³ 1922 SC 533.

²⁴ *Graham v United Turkey Red* 1922 SC 533 at 537 per Lord Anderson.

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Prescription and Limitation of Actions in Scotland and England in Relation to Dispute Resolution in Construction Contracts

This note examines the differences between prescription under Scots law and limitation in English law and how each relates to methods of dispute resolution, all in the context of actions under construction contracts. Such contracts commonly have elaborate dispute resolution clauses, requiring the parties to refer all disputes to adjudication¹ and then allowing for a move to arbitration and/or litigation. Under what circumstances is a party barred from pursuing an action?

The law of prescription in Scotland has complete application since it deals with rights and not merely remedies. Limitation in English law, however, does not extinguish the underlying obligation but only provides a defence to it forming the basis of an action. This leads to interesting results in the context of adjudication under construction contracts and its relationship with arbitration and litigation.

A. LIMITATION

Limitation is discussed here in an English context; limitation exists in Scotland as an English import but that aspect is not relevant here.²

The law is found in the Limitation Act 1980, which states that, “[a]n action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued”.³ If a document has been signed as a deed, rather than as a “simple contract” under English law,⁴ the limitation period is extended to twelve years.⁵ These statutory limitation periods can be varied by agreement.⁶ This means that after the limitation period has lapsed, the claim expires, although the underlying obligation still exists.

1 Adjudication is mandatory in construction contracts under the terms of the Housing Grants, Construction and Regeneration Act 1996 s 108. If the requirements of ss 108(1)-108(4) are not met, then the statutory adjudication Scheme under s 108(5) will apply. “Construction contract” is defined by s 104 of the 1996 Act.

2 D Johnston, *Prescription and Limitation* (1999) para 1.08; Prescription and Limitation (Scotland) Act 1973 Part II, which deals with, for example, personal injury.

3 Limitation Act 1980 s 5.

4 Section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 sets out the factors required for deeds as opposed to simple contracts.

5 1980 Act s 8.

6 *Lade v Trill* (1842) 11 LJ Ch 102.

The law provides for “fresh accrual of an action on acknowledgement or part payment”.⁷ This means that if the debtor makes a part payment or otherwise acknowledges to the creditor (in writing) that there is a debt owing, the clock is reset for limitation purposes.⁸ The “act and intention of the debtor” must be taken into account in deciding whether the limitation period has been reset.⁹ Therefore the time period for limitation would not be reset if the payment is presented as what the debtor understands to be payment of the full debt owed (or, indeed, if it is believed that more has been paid than is due) or that the sum paid was for a different debt.

The High Court in the case of *Lia Oil SA v ERG Petroli SpA*¹⁰ held that “without prejudice” communications “cannot amount to the acknowledgment of liability required to recommence the statutory limitation period under section 29(5) of the Limitation Act 1980”.¹¹ Limitation is therefore a defence to be pled by the defendant if an action is raised, which is not the case with prescription.¹²

B. PRESCRIPTION

The Scottish doctrine of negative prescription is contained in the Prescription and Limitation (Scotland) Act 1973, which provides that the obligations relevant to this note are “extinguished” after five years, calculated from the date the obligation became enforceable.¹³ The 1973 Act contains a prohibition on contracting out of its terms.¹⁴

The clock can be stopped from running by relevant acknowledgement.¹⁵ Relevant acknowledgement is similar to “acknowledgement or part payment” in England. Either the debtor makes a performance of some sort to suggest that the debt still exists (most likely part payment) or the debtor acknowledges in writing to the creditor that the debt still exists.

There is an important difference between the rules of prescription and of limitation. With limitation, the claim still exists—limitation is just a defence to the action. With prescription, the passage of time is seen as the abandonment by the creditor of the right to claim against the debtor, and the obligation is extinguished.

⁷ 1980 Act ss 29-31.

⁸ 1980 Act s 30.

⁹ *In Re Footman Bower & Co Ltd* [1961] Ch 443 at 449 per Buckley J.

¹⁰ [2007] EWHC 505 (Comm).

¹¹ *Lia Oil SA v ERG Petroli SpA* [2007] EWHC 505 (Comm) at para 29.

¹² I D Macphail, *Sheriff Court Practice*, 3rd edn by T Welsh (2006) para 2.114.

¹³ Prescription and Limitation (Scotland) Act 1973 s 6 and Sch 1. By virtue of Sch 1 paras 1(a) and (g) respectively, s 6 applies to obligations to pay sums of money and to obligations under a contract. In the case of reparation for “loss, injury or damage caused by an act, neglect or default” (1973 Act s 11) the relevant date is the date on which the loss (damnum) occurred, which is not always easily ascertained: see E J Russell, “Determining the date of damnum” 2009 SLT (News) 197.

¹⁴ 1973 Act s 13. Cf the position with limitation in England, described in the text accompanying n 6 above.

¹⁵ 1973 Act ss 6(1) and 10.

C. DISPUTE RESOLUTION IN ENGLAND AND SCOTLAND

(1) Litigation

As seen above, the doctrine of limitation does not deny that the obligation exists but merely acts as an obstacle to its enforcement. It is a defence which has to be pled,¹⁶ and if this is not done, the resultant decision is valid.¹⁷ Therefore a party is not barred as such from raising an action after the limitation period in an English court—although the chances of success may be slim. “Action” is defined in English law as including “any proceeding in a court of law, including an ecclesiastical court”.¹⁸ As will be seen below, this definition has been extended to include arbitration.

The position in Scotland is that the obligation itself falls. Therefore there can be no competent court action—as no obligation exists to be enforced by the courts. In law, there is no longer any obligation to perform, even if the debtor admits a prior liability. If an action is raised, the court itself can decide that the action may not proceed. Prescription is an irrebuttable presumption and the court has no discretion to disregard it, even if it is not raised by one of the parties.¹⁹ A party is therefore barred from raising a prescribed action in the Scottish courts.

(2) Adjudication

In construction contracts, adjudication must take place before any arbitration or court action; as such it may be a temporary measure. It can, however, prove to be a quick way to resolve problems without having to resort to these lengthier and more expensive procedures. This is of particular benefit to small construction businesses for whom cash flow is an issue.

The Housing Grants, Construction and Regeneration Act 1996 provides that either party may refer a case to adjudication “at any time”.²⁰ The High Court has confirmed that, in England, this means that matters can be referred to adjudication even after the usual limitation period has expired. In the case of *Connex South Eastern Ltd v MJ Building Services Group plc*,²¹ the Court of Appeal held that the phrase “at any time” meant, “exactly what it says... there is, therefore, no time limit... there is nothing to prevent a party from referring a dispute to adjudication at any time, even after the expiry of the relevant limitation period”.²²

The court went on to say that the respondent could, however, use limitation as a defence, and the adjudicator may choose to bear this in mind when coming to

16 D M Walker, *Prescription and Limitation of Actions*, 6th edn (2002) 5.

17 Ibid.

18 Limitation Act 1980 s 38(1).

19 Walker, *Prescription and Limitation* (n 16) 5.

20 Housing Grants, Construction and Regeneration Act 1996 s 108(2).

21 [2005] EWCA Civ 193.

22 *Connex South Eastern Ltd v MJ Building Services Group plc* [2005] EWCA Civ 193 at para 39 per Dyson LJ. In this case, however, the action was still within the limitation period. The respondent's argument (which failed) was that a Notice to Adjudicate sent by the appellant fifteen months after they repudiated the contract was an abuse of process, since the procedure could no longer be as “quick, cheap and temporary” as Parliament had intended: see para 37.

a decision. The intention of Parliament (examined in this case) was to allow the option of adjudication to be open indefinitely to encourage adjudications, rather than having unrealistic time limits written into contracts by adjudication-sceptics.²³ But since Parliament also envisaged that adjudication would be a potentially temporary measure, and did “not prevent parties from seeking a permanent decision through arbitration or the courts”,²⁴ why was the usual limitation period not imposed? This would give a reasonable opportunity for parties to refer a matter to adjudication whilst ensuring that the option to arbitrate or litigate was still open, without having to rely on parties contracting out of the limitation periods imposed by the Limitation Act 1980.

Since adjudication is not an “action” under the meaning of the Limitation Act, limitation is not really a defence. If argued, however, it can (and probably will) be taken into account in the same way by the adjudicator. Limitation is, after all, merely a defence in “actions” – it does not prevent them from being raised in the first place, or indeed from them being successful if the defence of limitation is not raised. If the idea was for adjudication to function in a similar way, the choice of the phrase “at any time” seems odd.

This also raises questions of ECHR compliance. Article 6(1) of the ECHR provides, amongst other things, that hearings (whether civil or criminal) should be “within a reasonable time”. Although adjudication seems to breach this aspect of article 6(1) (as well as others)²⁵ it has been held that an adjudicator is not a “public authority” under the terms of the Human Rights Act 1998.²⁶ Furthermore, the ability to challenge an adjudication has been held to make it ECHR-compliant.²⁷ The legislation on adjudication states that:²⁸

The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

Outwith the limitation period, the adjudicator’s decision (if not complied with) cannot be enforced by the courts if the defence of limitation is pled.²⁹ Adjudication is only

²³ HL Deb 23 Jul 1996, col 1344.

²⁴ Ibid.

²⁵ Cf J Miller and L N Cohen, “The Human Rights Act 1998: the implications for dispute resolution in the construction industry” (2000) 16(5) Construction LJ 295, which finds other reasons for adjudication (and arbitration) being potentially non-ECHR compliant (for example, the lack of publicity) but does not discuss the “reasonable time” issue.

²⁶ Section 6(3). See *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] BLR 272 at para 40.

²⁷ *Elanay Contracts Ltd v The Vestry* [2001] BLR 33. The European Court of Human Rights has not directly considered the issue, but *Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213 held that the tests under article 6(1) were not as stringent in civil matters as they were in criminal matters and that member states had a certain degree of discretion when it came to ensuring a hearing was “fair”.

²⁸ Housing Grants, Construction and Regeneration Act 1996 s 108(3).

²⁹ J Redmond, *Adjudication in Construction Contracts* (2001) 48.

the final step of a dispute if both parties agree it should be. Whilst the decision can be final, it is unenforceable if time barred and without sanctions to back it up, it may be ineffectual. If the decision is complied with, then there is no issue. If, however, the decision is not complied with, the aggrieved party needs to proceed to have the decision implemented by the court to attempt to enforce compliance. Failure to comply with the terms of the adjudicator's award is classed as a breach of the original contract.³⁰ Similarly, either party may proceed to arbitration or litigation (depending on the dispute resolution provisions in the contract) for the case to be heard afresh. Since litigation and arbitration are "actions" under the Limitation Act 1980, the limitation periods will apply – six years if the original contract was executed as a simple contract or twelve years if it was a deed (or otherwise as varied by the terms of the contract). There is no luxury of bringing the action "at any time" without the defence of limitation being available, which (if pled) will overrule the outcome of the adjudication.

The Housing Grants, Construction and Regeneration Act 1996 also applies in Scotland. Therefore it would seem that a party could also refer a dispute "at any time" to an adjudicator. How does this sit, however, with the doctrine of prescription being in operation, as opposed to the doctrine of limitation? This anomaly does not seem to have been discussed as the bill was progressing through Parliament.

The Court of Session held in *Douglas Milne Ltd v Borders Regional Council*³¹ that the duty to refer a matter to a contract engineer pre-arbitration was an obligation under a contract for the purposes of the Prescription and Limitation (Scotland) Act 1973, Schedule 1 para 1(g) (to which the five year negative prescription applies). The parties were *obliged* to refer the matter to a contract engineer before proceeding to arbitration under a contract term. By implication, since it is an obligation under a construction contract to refer to an adjudicator pre-arbitration/litigation, the doctrine of prescription must apply.

Even if an adjudication was not a contractual obligation and could commence after five years, the obligation to perform would have prescribed. The adjudicator in Scotland would be bound to find that no obligation exists, rendering the process futile.

(3) Arbitration

The (English) Arbitration Act 1996 provides that "[t]he Limitation Acts apply to arbitral proceedings as they apply to legal proceedings".³² As was seen above, adjudications may proceed to arbitration. In arbitrations outwith the limitation period, the defence of limitation may be pled. The arbitrator will then surely find that the obligation to perform is time-barred and the decision of the adjudicator falls.

³⁰ *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] CLC 739.

³¹ 1990 SLT 558.

³² Arbitration Act 1996 s 13.

Arbitration is a fairly uncommon procedure in Scotland, but we await an influx of arbitrations with the new Arbitration (Scotland) Act 2010 gradually coming into force.

The Prescription and Limitation (Scotland) Act 1973 narrates that an obligation is extinguished unless a “relevant claim” is made.³³ “Relevant claim” is defined as (amongst other things) a claim made “in appropriate proceedings”.³⁴ “Appropriate proceedings” include arbitration, but not adjudication.³⁵

Prescription also applies to arbitrations in Scotland if, like adjudication, they are an obligation under a contract.³⁶ In any event, the underlying obligation has prescribed and there is nothing for the arbitrator to consider. Case law confirms that if one party does refer a prescribed matter to an arbitrator, that arbitrator can, by stated case, refer the matter to the Inner House who will then hold that the arbitrator is barred from considering the issue.³⁷ The arbitrator cannot consider the matter because, in the eyes of the law, no dispute exists.³⁸

D. CONCLUDING REMARKS

The doctrines of limitation and prescription are very different concepts. In England, limitation allows the curious case of actions being time-barred whilst the obligation still subsists as a potentially unenforceable apparition. In Scotland, prescription extinguishes the obligation itself.

The right to use the process of adjudication in England does not lapse and sums due are never limited in time. A party is free, therefore, to raise the action even after the limitation period has expired, although the defence of limitation may be available. This seems like a pointless exercise as the unhappy party can then refuse to comply with the adjudicator’s ruling. Although potentially binding, it requires to be enforced if not complied with – and limitation prevents that from happening. If referred to arbitration or litigation and the defence of limitation is pled, the decision of the adjudicator falls.

In Scotland, the referral to an adjudicator or arbitrator under a contract may be classed as an obligation and so prescribes after five years. In any event, the underlying obligation itself has prescribed and the case will be thrown out.

Therefore, in Scotland, a party has no access to any method of dispute resolution once a period of five years has passed without the obligation being enforced. In England, the situation is different – adjudications may be brought “at any time”. Once a party needs the courts to enforce the decision, however, or once appealed to an arbitrator, limitation will apply and render the initial decision worthless. The referring party in an adjudication started out with the applicable limitation period therefore runs the risk that the whole process will be futile, and should be properly advised

³³ Prescription and Limitation (Scotland) Act 1973 s 6.

³⁴ 1973 Act s 9(1)(a).

³⁵ 1973 Act s 4(2), as amended by the Arbitration (Scotland) Act 2010 s 23(2)(a).

³⁶ R L C Hunter, *The Law of Arbitration in Scotland*, 2nd edn (2002) para 8.11.

³⁷ *Douglas Milne Ltd v Borders Regional Council* 1990 SLT 558.

³⁸ Hunter, *Arbitration* (n 36) para 20.23.

on this point. Advice to the respondent should be not to rest at adjudication in the – perhaps unlikely – event that the limitation argument does not succeed there, but to proceed to arbitration or litigation to take advantage of the limitation defence.

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The Aarhus Convention: Can Scotland Deliver Environmental Justice?

The Convention on Access to Justice, Information and Public Participation, commonly referred to as the Aarhus Convention, was ratified by the United Kingdom Government on 24 February 2005 and by the European Community by a Council decision of 17 February 2005. Drawn up under the auspices of the United Nations Economic Council for Europe, it had two main objects: to provide a more transparent and open system for environmental decision-making, and to provide procedural rights for individuals within that system of decision-making. The rights provided are, broadly, a right to obtain information about the environment whether or not within the scope of a specific decision, consultation rights on specific classes and types of decisions, and rights to challenge decisions thereafter.

Although it might have been expected that countries from the former Soviet bloc and Eastern Europe would face the biggest challenges in compliance, this has not proved to be true. Three recent draft decisions by the Compliance Committee to the Convention have highlighted the difficulties that the UK faces.

Part of the Convention requires access to environmental justice – in other words, the ability to challenge environmental decisions via a court or administrative body. That of itself does not necessarily present a difficulty for the UK.¹ However, article 9(4) provides that access to justice should not be “prohibitively expensive”, raising questions as to the UK’s (and with it Scotland’s) compliance with the Convention.

How far article 9 goes is a matter of dispute. The UK Government’s position is that (broadly) Article 9 only requires certain types of disputes to be subject to its provisions, such as those created by the Convention (disputes over access to

¹ However, the scope of judicial review is likely to be the subject of further complaints before the Aarhus Compliance Committee. See the Committee’s comments at paragraph 125 of its decision in complaint ACCC/C/2008/33 (available via <http://www.unece.org/env/pp/compliance/Compliance%20Committee/33TableUK.htm>) in respect of proportionality as a test for judicial review, which indicate that the test of Wednesbury unreasonableness may not comply with article 9. In the Scottish context, there are likely also to be issues with title and interest to sue.

information and public participation for example). Under this interpretation, the UK would argue that nuisance claims, for example, would be excluded from its provisions. An alternate view is that all types of environmental dispute fall within the scope of the Convention. The latest decisions from the Compliance Committee support the latter interpretation of article 9, widening the potential impact of its draft findings.

It is important to remember that the role of the Compliance Committee is not to rule on individual cases, but rather to provide an assessment of whether a country is in compliance with the Convention, albeit that such an assessment is inevitably based (at least in part) on individual facts and circumstances. The Compliance Committee has no powers of sanction as such, although the UK will be expected to report back on steps taken to comply with the Committee's findings (if upheld).

A. THE COMPLAINTS

There were essentially three complaints looked at together by the Committee. The complaints, concerning various environmental disputes, considered whether the UK complied with article 9 in four ways. The Committee was asked to rule on whether the restriction of judicial review to matters concerning procedure rather than substance was a breach of article 9, whether accessing justice through the courts is prohibitively expensive, on whether individuals had sufficient rights to bring action for a breach of environmental law, and finally whether there was compliance in respect of the time limits for bringing an application for judicial review in respect that they were uncertain. It should be noted that although there was the odd reference to a Scottish case, the Committee's draft findings only relate to England and Wales. However, the thinking of the Committee gives a strong steer insofar as Scotland's position is likely to be considered.

In the end, although persuasive arguments were made on all points, the Committee did not uphold the complaints on the issue of the scope of judicial review (although it did express some reservations as to whether England and Wales were complying with the Convention in this respect), nor did it uphold the complaint insofar as the right of the individual to raise breaches of environmental law are concerned. It has in its draft findings upheld the complaint regarding the time limits for judicial review and on whether challenging court decisions is prohibitively expensive.

B. THE COMMITTEE'S DECISION

(1) Timing of judicial review

The UK asserted that the usual rule in England and Wales that a judicial review be brought "promptly" did not necessarily breach the Convention.² It argued that the court has discretion as to when to start the time limit applying, with this element of judicial discretion allowing fairness to all parties. The UK relied on the desirability

² An application for judicial review must be filed promptly and in any event no later than 3 months after the grounds to make the claim first arose: Civil Procedure Rules 1998, SI 1998/3132 r 54.5.

of public law challenges being brought speedily to give certainty to all parties. It also pointed to the ruling in *Lam v United Kingdom*,³ where the European Court of Human Rights refused to uphold a complaint under article 6 of the ECHR regarding the refusal of Mr Lam's judicial review for lack of a prompt application.

The Compliance Committee, whilst accepting there was a balance between the need for certainty and the interests of the individual, did not accept the discretion available to the courts equated with compliance. It has provisionally found that discretion gives rise to "significant uncertainty" and as such the UK should set a clear minimum time limit to bring a claim, and clarify that the time limit should run from the date on which a claimant knew, or ought to have known of the act or omission under challenge.

(2) "Not prohibitively expensive"

The other aspect of the judgment (and probably the most far reaching of the Compliance Committee's judgments to date insofar as the UK is concerned) is its draft findings on the cost of litigating environmental disputes.

The crux of the question is what "not prohibitively expensive", as found in article 9(4) of the Convention, requires. Although not directly answering this question, the Committee's draft findings are likely to require a major policy shift of the practice and procedure of the courts to ensure compliance.

The UK argued that a combination of a number of factors allow individuals and non-governmental organisations access to environmental justice through the courts. Firstly and fundamentally, the courts have discretion on expenses, and this discretion allowed the interests of justice to be met by making fair decisions based on individual circumstances. Further, this judicial discretion was added to by three specific measures: first, the availability of legal aid for environmental disputes, secondly, the extensive use of Protective Costs Orders and thirdly, the availability of insurance to cover liability for expenses in the event of losing.⁴ The UK observed that the requirement that access to justice must not be "prohibitively expensive" does not require access to be free or low cost. Judicial discretion on whether expenses were awarded at all or if so how much, coupled with the availability of legal aid, protective costs orders and insurance were in combination sufficient to meet this test.

On legal aid, the UK put information before the Committee showing that legal aid was regularly granted for public interest environmental matters in England and Wales, and was also available for private disputes on environmental law. It argued the flexibility given to the Legal Services Commission's Funding Code would allow, for example, a case to be taken by an individual obtaining legal aid

³ App No 41671/98, 5 Jul 2001.

⁴ In 2008 a periodic report was made by the UK to the Aarhus Compliance Committee on progress in implementing the Convention. Within that report, the UK focused on reductions that had been made in relation to court fees for lodging cases in showing compliance with article 9. Although this may account for some of the cost of litigating it will be, generally speaking, a small component of the overall cost. The true costs of litigating are first, the costs of the party's own legal representatives, and secondly, the payment of expenses in the event of losing.

and a non-governmental organisation or community group. The Code permits the contribution from the Commission on behalf of the legally aided individual to be tailored according to the specific resources of each party. Amendments have recently been made to the Code to clarify that contributions towards the cost of the case from others are only expected if there is a readily identifiable and constituted group supporting the individual.

In a Scottish context, it is practically very difficult to obtain legal aid where there are others with a similar interest. Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002⁵ will prevent an individual from obtaining legal aid if there are others with a joint interest, and it is reasonable and proper to expect those others to pay the costs that the Scottish Legal Aid Board would otherwise meet. Although there are a number of practical problems associated with gathering information on whether others with a joint interest truly exist, and what might be reasonable to expect such others to pay, Regulation 15 has tended to prevent legal aid being granted in environmental cases.⁶ It is also worth noting that given the Committee indicated that reliance on *pro bono* legal assistance would be insufficient to meet the requirements of article 9. In this regard alone, it seems that Scotland's position on legal aid applications with an environmental argument will need to change.

Secondly, the UK argued that extensive use of Protective Costs Orders (PCOs) in England gave certainty to liabilities for costs. The UK noted that PCOs could limit liability to as little as £1,000. This contrasts with the position in Scotland where only one Protective Expenses Order has been granted, with a cap of £30,000.⁷

Finally, the UK relied on the availability of insurance which could be purchased to protect against liability for expenses. However, their submissions on this heading were somewhat undermined by the publication of Lord Justice Jackson's report, which recommended that the simplest way to ensure Aarhus compliance was by allowing one way costs shifting for judicial review cases (albeit that such costs shifting would not be automatic).⁸ Lord Jackson's report also recommended the abolition of the provisions which allowed for the recovery of after the event insurance premiums. Although before the event insurance may cover some environmental claims such as

⁵ SSI 2002/494.

⁶ See for example *McGinty v Scottish Ministers* [2010] CSOH 5, where Lady Dorrian was advised that Mr McGinty, although financially eligible, had been refused legal aid under Regulation 15. A Freedom of Information request to the Scottish Legal Aid Board has shown that other applications which appeared to be environmental actions were also refused on the same grounds.

⁷ *McGinty v Scottish Ministers* [2010] CSOH 5.

⁸ *Review of Civil Litigation Costs: Final Report* (2009), available via <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs>. It should be noted, however, that the review's recommendations – if implemented – would still allow the question of what is reasonable according to the resources of the parties to be taken into account in determining whether one way costs shifting would apply. The test recommended by Jackson LJ (at para 3.10) is as follows: "Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including: (a) the financial resources of all the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate."

nuisance claims, it is likely to be available to a limited number of circumstances and only to individuals and not groups or non-governmental organisations.

The Compliance Committee did not accept the UK's arguments that the combination of judicial discretion and the specific factors listed above provided compliance with the Convention. Whilst accepting that the "loser pays" principle of English law was not automatically a breach of the Convention, it held that significant problems arose from the limitations on protective costs orders (including the caps normally placed on recovery of the claimant's fees). The restriction of such orders to cases of wider public importance or exceptional circumstances also, in the Committee's view, limited their effectiveness as a measure to show the UK complies with the Convention. It also considered the requirement to give cross-undertakings in damages in cases for injunctive relief to be a breach. Lastly, it considered that where costs had been awarded, there was insufficient weight given by the court to the public interest nature of the dispute.

The Committee recommended reviews of the time limits for raising actions of judicial review and of the way that expenses are dealt with to provide clear, equitable and transparent rules for both.

C. CONCLUSIONS

Much of the concern of the Committee focused on uncertainty, whether in respect of time limits or costs. In a Scottish context, it must raise issues as to whether a number of aspects of judicial review – title and interest, time limits and expenses – will survive scrutiny.

However, the Committee did not go so far as to make more specific recommendations on what the reviews should necessarily contain. It had been urged by one of the complainant's lawyers to direct the UK should introduce a "genuine" rule of cost shifting, leaving no discretion to the courts. The Jackson Review's recommended tests do not go that far, given that Lord Jackson seems still to envisage a test of reasonableness in making the decision on whether one way cost shifting should be granted.

The Court of Session Rules Council is understood to have considered amendments to the Court of Session Rules providing provision on Protective Expenses Orders in cases covered by the Public Participation Directive.⁹ There are two main problems with this approach.

The first is that the proposed rules appear to encourage a subjective approach by the court to what is or is not affordable. It is noticeable that this contrasts with the objective approach that was taken by Lord Justice Sullivan in *Garner v Elmbridge Borough Council*¹⁰ where a Protective Costs Order was granted even though there was an absence of detailed financial information provided.

⁹ Parliament and Council Directive 2003/53/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice, OJ 2003 L 156/17.

¹⁰ [2010] EWCA Civ 1006.

The second problem is that the proposed rules appear only to cover certain cases in the Court of Session. The rules are understood only to refer to cases covered by the Public Participation Directive and although there might be scope for argument as to how far this extends, it could not cover all types of environmental disputes under article 9(3) of the Aarhus Convention (breaches of national environmental laws).

Given this, alongside the background of the limited use of protective costs orders in Scotland, and difficulties in obtaining legal aid, it would appear that Scotland still has some way to travel before Aarhus is fully implemented.

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We Want You: Extradition in the UK Supreme Court

Nearly twenty years on, Lord Griffiths' oft-cited observation that "[u]nfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale..."¹ has lost none of its force. Phenomena such as the internet and the ease and affordability of international travel have resulted in an electronic and physical erosion of borders, as well as opening up the possibility of instantaneous and continuous communication regardless of geographic location. Acts carried out in one jurisdiction, whether by accident or design, can have an adverse or undesired effect in another, or indeed several others. The friction created between France and the United States (USA) by the online sale of alleged Nazi memorabilia (prohibited under French law) on the Yahoo! website² or the issue of assisted suicide³ (called 'suicide tourism' by some) are but two such examples.

With these developments in mind, and particularly since the events of 11 September 2001, there has been an increased emphasis on international cooperation in thwarting future terrorist attacks and capturing, as well as preventing the training and harbouring of, terrorist suspects. In the words of Lord Justice Laws, "the fight against increasingly globalised crime, the denial of safe havens for criminals, and the general benefits of concrete co-operation between States is an important common cause".⁴ Against this background, the UK and USA entered into a new bilateral treaty to deal with extradition. On the 1st January 2004, the Extradition Act 2003 entered into force. Yet in the years of its operation since, often the most prominent and hard-fought cases against extradition under the 2003 Act have been concerned with white

1 *Somchai Liangsirprasert v Government of the United States of America* [1991] 1 AC 225 at 251C per Lord Griffiths.

2 See *Yahoo! Inc v LICRA and UEJF* 433 F 3d 1199 (9th Cir 2006).

3 See *R (on the application of Purdy) v Director of Public Prosecutions* [2010] 1 AC 345.

4 *Norris v Government of the United States of America* [2009] EWHC 995 (Admin) at para 24.

collar criminals, rather than suspected terrorists.⁵ Stanley Tollman, the “NatWest Three”⁶ and Gary McKinnon have all been requested by the USA for extradition. In most (if not all) of these cases, a breach of the European Convention on Human Rights, as implemented by the Human Rights Act 1998, has been argued in the UK domestic courts by the extraditee to prevent their removal, but with little success to date.⁷ With the United Kingdom Supreme Court unanimously dismissing his appeal on 24 February 2010, Ian Norris, the former Chief Executive Officer of Morgan Crucible, has not bucked this trend.

A. THE DECISION

In an indication of both the importance and authority of the decision, *Norris v Government of the United States of America*⁸ was one of only three cases to be heard by a bench of nine justices in the Supreme Court’s first year of hearing appeals.⁹ The issue for determination was whether the extradition of Mr Norris to the USA was compatible with his right to respect for his private and family life under article 8 of the ECHR.¹⁰ The Supreme Court unanimously held that it was. Lord Phillips, President of the Court, delivered the main judgment with which all the other justices agreed.

Ian Norris, a 67 year old UK national, had been sought for extradition by the USA for some time. After retiring as CEO of Morgan Crucible (an international manufacturer of carbon products) due to ill-health in 2002, a price fixing investigation in the carbon industry saw a grand jury sitting in the Eastern District of Pennsylvania return an indictment on which the extradition of Mr Norris was sought in September 2004. Norris’ case eventually reached the Supreme Court’s predecessor, the Appellate Committee of the House of Lords, in early 2008.¹¹ His appeal was allowed, in part, as participation in a cartel was not, at the material time (1989-2000), a criminal offence

5 However, Babar Ahmad, the first British citizen to be requested under the 2003 Act, is accused of supporting terrorism and has been detained without trial since 2004. See *Ahmad v United Kingdom* (2010) 51 EHRR SE6.

6 They are David Bermingham, Giles Darby and Gary Mulgrew respectively. See *R (on the application of Bermingham and others) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727.

7 Under section 87 of the 2003 Act, a judge must decide whether extradition to a category 2 territory is compatible with the rights afforded to the person under the ECHR within the meaning of the Human Rights Act 1998.

8 [2010] UKSC 9, [2010] 2 WLR 572.

9 The other two cases are *R (on the application of E) v JFS Governing Body* [2009] UKSC 15, [2010] 2 WLR 153 and *R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2010] 3 WLR 223.

10 Other potential bars to extradition are the rule against double jeopardy, extraneous considerations (that the extradition request and intended punishment are motivated by a discriminatory purpose), hostage-taking considerations, that it would be unjust or oppressive due to the passage of time elapsed since the person allegedly committed the offence or had been unlawfully at large, or that it would be unjust or oppressive in light of the physical or mental condition of the person concerned. It was not alleged that any of these provisions applied to Mr Norris.

11 *Norris v Government of the United States of America* [2008] 1 AC 920.

under common law or statute (until the Enterprise Act 2002) in England and Wales, thus lacking the requisite double criminality.¹² The House of Lords remitted the case for reconsideration by the District Judge.

In this instance, the extradition offence with which the Supreme Court was concerned was not price-fixing, but obstruction of justice. Mr Norris was, for example, accused of instructing the removal, concealment and destruction of incriminating documentation and of meeting several co-conspirators in England in 1999 to discuss the investigation by the authorities and to devise a false explanation (one other than price fixing) for their meetings. It is plain that the members of the Supreme Court viewed the alleged conduct of Mr Norris as serious¹³ and were clearly unimpressed by the submission made by Norris' counsel that the previous decision of the House of Lords had left the case against Norris devoid of any serious content. This contention was met by the reply from Lord Phillips in his judgment that there was "plenty of stuffing left".¹⁴

The question before the Supreme Court was "entirely one of proportionality".¹⁵ It was "not in doubt" that extraditing Mr Norris would interfere with his private and family life under article 8(1) of the ECHR.¹⁶ The crux of the matter was whether that interference was justified under article 8(2) as being "necessary in a democratic society . . . for the prevention of disorder or crime".¹⁷ The answer from the Supreme Court was a resounding yes. Such interference was a "sad, but justified, consequence of many extradition cases".¹⁸ The Court was clearly sympathetic to the poor health, physical and mental, of both Mr Norris and his wife, their age, length of marriage and dependence on one another. Moreover, Lord Phillips asserted that rather than focussing solely on the consequences for the extraditee, the family unit as a whole had to be considered in the extradition process.¹⁹ However, the fact remained that Norris was fit to travel and fit to stand trial. While there had been a considerable delay from the point when his extradition was initially sought, this was due in no small part to the actions of Mr Norris himself.²⁰ The public interest in the prevention and suppression of crime, which included the public interest in the UK's compliance with extradition arrangements, was not outweighed by the mutual dependency and ill-health of Mr and Mrs Norris.²¹ In the words of Lord Hope, "[h]is family life must, for the time being, take second place".²² In addition, Lord Kerr urged the other members of the Supreme Court not to lose sight of the bigger picture behind the circumstances of this particular case. It was essential to recognise a "wider dimension"

12 See *Norris* [2010] UKSC 9 at para 120 per Lord Collins.

13 See paras 92 and 106.

14 Para 71.

15 Para 87.

16 Para 102.

17 Para 106.

18 Para 107.

19 Para 64.

20 Paras 93 and 138.

21 Para 131.

22 Para 93.

and that “the preservation and upholding of a comprehensive charter for extradition be maintained”.²³

B. ANALYSIS

This decision by the Supreme Court is clearly a shot across the bows for those who contemplate making similar human rights challenges in future in their search for a bar to extradition. As Lord Kerr emphasised in his judgment, the “essential point is that such is the importance of preserving an effective system of extradition, it will in almost every circumstance outweigh any article 8 argument”.²⁴ Unlike its counterpart in the United States, the Supreme Court in the United Kingdom does not sit *en banc*. Thus a unanimous decision of nine justices such as this is as authoritative a statement of the law as one is ever likely to get and highly unlikely to be overturned. The message for extraditees, present and future, is loud and clear: attempts to attack or highlight the alleged one-sidedness of the present extradition arrangements between the UK and USA under the guise of a human rights challenge are, in all likelihood, doomed to failure.

Rightly or wrongly, the reasons for that disgruntlement appear to be threefold. First, when seeking extradition under the 2003 Act, the USA need only produce a statement of the facts of the offence (rather than *prima facie* evidence) while the UK, on the other hand, must demonstrate “probable cause”. This perceived evidential imbalance, combined with the USA’s aggressive extraterritorial pursuit of individuals whose conduct has occurred either tangentially in the territory of the USA or not at all,²⁵ as well as its possession of a strong plea bargaining culture²⁶ and track record of draconian sentencing for white collar criminals,²⁷ has fuelled resentment by some towards the current extradition arrangements between the two countries. However, the view of the UK courts, confirmed by Lord Phillips, has been that extradition proceedings “should not become the occasion for a debate about the most convenient forum for criminal proceedings”.²⁸

²³ Para 133.

²⁴ Para 136.

²⁵ See, for example, *Pasquantino v United States* 544 US 349 (2005). However, typical of the borderless nature of the internet and cybercrime, the allegations against Gary McKinnon concern activities carried out in their entirety from his home computer in London but directed at military computer networks in the USA.

²⁶ The use of plea bargaining formed the subject matter of Gary McKinnon’s unsuccessful appeal to the House of Lords in 2008. See *McKinnon v Government of the United States of America* [2008] UKHL 59, [2008] 1 WLR 1739.

²⁷ While both examples are perhaps the product of extreme cases, Bernard Madoff and Jeffrey Skilling were sentenced to imprisonment for periods of 150 years (or 1,800 months) and 24 years respectively. See the sentencing transcript available at <http://www.justice.gov/usao/nys/madoff/20090629sentencingtranscriptcorrected.pdf>

²⁸ Para 67.

C. CONCLUSION

Perhaps however the legal challenges of those resisting extradition, such as the computer hacker Gary McKinnon, have already had their desired effect. On the 6th September 2010, the Home Secretary (Theresa May) announced in the House of Commons that the government would review the UK's present arrangements regarding extradition with the USA, as well as the operation of the European arrest warrant.²⁹ Lord Justice Scott Baker has been appointed to lead the review and the panel is due to report back in the late summer of 2011.³⁰ While that news will now offer little consolation to Ian Norris, convicted in July by a federal jury in Philadelphia of conspiring with others to obstruct justice and facing a potential five years in prison and \$250,000 fine,³¹ the review will be a real sign of hope and encouragement to critics of the 2003 Act and, more importantly, to those such as Christopher Tappin,³² another British businessman who may yet succumb to an extradition arrangement now quite possibly in its death throes.

Chris Stephen

²⁹ HC Deb 6 Sep 2010, cols 11-12.

³⁰ See Home Office, "Lord Scott Baker to lead extradition review" 14 Oct 2010, available at <http://www.homeoffice.gov.uk/media-centre/news/scott-baker>.

³¹ See Department of Justice Office of Public Affairs, "Former CEO of the Morgan Crucible Co found guilty of conspiracy to obstruct justice", 27 Jul 2010, available at <http://www.justice.gov/opa/pr/2010/July/10-at-859.html>.

³² See Kaim Todner, "Media statement re extradition of Christopher Tappin", 17 Aug 2010, available at http://www.kaimtodner.com/news/2010/08/17/kaim_todner_media_statement_re_extradition_of_christopher_tappin.asp.